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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Federal Communications Commission Record

Volume 7
Issue 9

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iv

Table of Docket Numbers..... v

Table of Rulemaking Numbers..... vii

Table of Localities..... viii

Table by Subject Matter..... x

Table by Statutory and Rule Provisions..... xiv

Decisions, Reports, Memorandum Opinions, Orders, and Other Selected Material..... 2468

Federal Communications Commission Record

Table of Cases
Volume 7
Issue 9

Case Name	Page
800 Database Access Service	2723
AT&T Communications	2603
AT&T Communications	2715
Aberdeen Florist, Inc.	2482
Ackerman, Eve	2493
Amendment of Part 0 - Forfeiture Proceeding	2650
Amendment of Part 80 - VHF Marine Channel 9	2618
Amendment of Part 90 - Motion Picture Radio Service	2718
Amendment of Sections 0.251 and 1.115	2695
American Airlines, Inc.	2652
American Telephone and Telegraph Company	2580
Aquatic Technical Services, Inc.	2542
Astro Sheet Metal, Inc.	2536
Basic Services, Inc.	2530
Bell Atlantic Telephone Companies	2724
Bishop, Donald W.	2546
Black Television Workshop of Los Angeles, Inc.	2716
Bowser, Geof L.	2540
Capitol City Broadcasting Company	2629
Carriers File Revisions to their Cost Allocation Manuals	2590
Central Atlantic Contractors, Inc.	2569
Central Power and Lighting Co.	2509
Century Telephone Enterprises, Inc.	2598
Century Telephone Enterprises, Inc.	2599
Century Telephone Enterprises, Inc.	2640
City of Alice, Texas	2507
Communications Satellite Corporation	2636
Communications Satellite Corporation	2637
CompUSA, Inc.	2490
Comparative Broadcast Hearing Policy	2664
Competition in the Interstate Interexchange Marketplace	2677
Continental Mobile Telephone Company, Inc.	2675
Cooperative Power Association	2471
Corun & Gatch, Inc.	2523
Crane, Sandra V.	2698
Davis, Ronald	2534
Devlin, Peter Joseph and Patricia Eve	2499
Dispatch Communications of the Mid Atlantic, Inc.	2561
Execuline of Sacramento, Inc.	2646
Finders Preference Program	2578
First Commonwealth Communications, Inc.	2614
First Media of Monterey, Inc.	2648

Case Name	Page
Fitzgerald, Harry	2513
GBC Contractors, Inc.	2538
Genstar Stone Products Company	2515
Gomez, Johnny V.	2498
Goodlettsville Broadcasting Company, Inc.	2528
Harford Sands, Inc.	2517
Harkins & Company	2543
Helen Broadcasters, Inc.	2501
Investment in the Broadcast Industry	2654
Jaeger, Inc.	2511
Jean-Pierre Scioville	2505
John Wayne Company	2694
Kawalec, Gerald A.	2624
LEOSAT Corporation	2469
Lamoille Broadcasting and Communications General Partnership	2700
Las Americas Communications, Inc.	2625
Litel Telecommunications Corporation	2506
Liuski International, Inc.	2491
Local Exchange Carrier Line Information Database	2653
Lynn Broadcasting	2591
Lynn Broadcasting	2631
Magness Plumbing & Heating, Inc.	2484
Mattice, Richard E.	2572
McCarty, Maryann	2481
McGlothlin & Benham Electric Company, Inc.	2519
McGuire Refrigeration, Inc.	2521
Mid Atlantic Installation Services, Inc.	2488
Minneapolis SMSA Limited Partnership	2548
Moll-Tex Broadcasting Company	2689
Newport News Cablevision, Ltd. Communications, Inc.	2610
Nexus Engineering Corporation	2692
Normalization of Earnings on Form 492	2735
North American Teletrac: Location Technologies, Inc.	2563
Open Network Architecture Tariffs of Bell Operating Companies	2604
PZ Entertainment Partnership, L.P.	2696
Paul's Utility Co.	2486
Pizano, Roberto	2571
Plourde, David	2545
Policies and Rules - Changing Long Distance Carriers	2600
Profit Enterprises, Inc.	2547
Protel, Inc.	2734
Ramon Rodriguez and Associates, Inc.	2633
Revision of Radio Rules and Policies	2755
Russell-Rowe Communications, Inc.	2525
Russian River Vintage Broadcasting	2703
San Juan Marina	2479

Case Name	Page
Section 5301 of the Anti-Drug Abuse Act of 1988	2641
Segars Communications, Inc.	2691
Sellers, Gary	2472
Smithson, Kenneth M.	2565
Southwestern Bell Telephone Company	2649
Springtown Educational Broadcasting Foundation	2588
Suit, William	2532
Sumter Radio Partners	2573
Table of Allotments, FM, Abilene and Colorado City, TX	2586
Table of Allotments, FM, Ashland, WI	2705
Table of Allotments, FM, Benton, Clarksville and Dardanelle, AR	2555
Table of Allotments, FM, Fagaitua, American Samoa	2706
Table of Allotments, FM, Fosston, MN	2550
Table of Allotments, FM, Hawesville and Hardinsburg, KY	2708
Table of Allotments, FM, Lake George, NY	2554
Table of Allotments, FM, Obion and Tiptonville, TN	2644
Table of Allotments, FM, Perry, Cross City and Holiday, FL	2642
Table of Allotments, FM, Perry, Cross City and Holiday, FL	2557
Table of Allotments, FM, Philpot, KY	2711
Table of Allotments, FM, Springfield, MN	2713
Table of Allotments, FM, Tahlequah, OK	2552
Telephone Consumer Protection Act of 1991	2736
Telesphere Network, Inc.	2647
Tempo Satellite, Inc.	2728
The Computer Exchange	2468
The Computer Force	2687
The Hearst Corporation	2623
US West Communications, Inc.	2674
Unrouted Ship-to-Overseas INMARSAT Telex Traffic	2579
Use of New Telecommunications Technologies	2733
Virgin Islands Telephone Corporation	2609
Voices North, Inc.	2639
Whiteford Construction Co., Inc.	2567

Table of Cases by Delegated Authority and FCC Number
Volume 7
Issue 9

Delegated Authority or FCC Number	Page	Delegated Authority or FCC Number	Page
DA 92 - 390	2598	DA 92 - 496	2588
DA 92 - 398	2733	DA 92 - 499	2623
DA 92 - 410	2599	DA 92 - 500	2610
DA 92 - 419	2600	DA 92 - 501	2614
DA 92 - 446	2578	DA 92 - 503	2648
DA 92 - 452	2550	DA 92 - 504	2734
DA 92 - 455	2603	DA 92 - 505	2646
DA 92 - 456	2552	DA 92 - 506	2647
DA 92 - 457	2723	DA 92 - 508	2698
DA 92 - 458	2554	DA 92 - 509	2652
DA 92 - 459	2555	DA 92 - 510	2640
DA 92 - 462	2674	DA 92 - 511	2715
DA 92 - 463	2469	DA 92 - 512	2636
DA 92 - 464	2675	DA 92 - 513	2637
DA 92 - 465	2586	DA 92 - 514	2641
DA 92 - 466	2548	DA 92 - 540	2724
DA 92 - 467	2642	FCC 92 - 69	2728
DA 92 - 468	2557	FCC 92 - 96	2654
DA 92 - 469	2644	FCC 92 - 97	2755
DA 92 - 470	2687	FCC 92 - 98	2664
DA 92 - 471	2689	FCC 92 - 113	2468
DA 92 - 472	2691	FCC 92 - 114	2530
DA 92 - 473	2692	FCC 92 - 115	[illegible]
DA 92 - 474	2694	FCC 92 - 116	[illegible]
DA 92 - 475	2471	FCC 92 - 117	2536
DA 92 - 476	2735	FCC 92 - 118	2538
DA 92 - 477	2505	FCC 92 - 119	2479
DA 92 - 478	2506	FCC 92 - 120	2481
DA 92 - 479	2649	FCC 92 - 121	2482
DA 92 - 480	2705	FCC 92 - 122	2490
DA 92 - 481	2706	FCC 92 - 123	2484
DA 92 - 482	2525	FCC 92 - 124	2486
DA 92 - 483	2604	FCC 92 - 125	2488
DA 92 - 485	2708	FCC 92 - 126	2561
DA 92 - 486	2711	FCC 92 - 127	2563
DA 92 - 487	2713	FCC 92 - 128	2565
DA 92 - 489	2609	FCC 92 - 129	2567
DA 92 - 492	2579	FCC 92 - 130	2569
DA 92 - 493	2580	FCC 92 - 131	2507
DA 92 - 494	2590	FCC 92 - 132	2509
DA 92 - 495	2653	FCC 92 - 133	2511

FEDERAL COMMUNICATIONS COMMISSION

Delegated Authority or FCC Number	Page
FCC 92 - 134	2513
FCC 92 - 135	2515
FCC 92 - 136	2517
FCC 92 - 137	2519
FCC 92 - 138	2521
FCC 92 - 139	2523
FCC 92 - 140	2540
FCC 92 - 141	2542
FCC 92 - 143	2543
FCC 92 - 144	2624
FCC 92 - 145	2545
FCC 92 - 146	2571
FCC 92 - 147	2546
FCC 92 - 148	2572
FCC 92 - 149	2547
FCC 92 - 150	2491
FCC 92 - 167	2650
FCC 92 - 176	2736
FCC 92 - 177	2625
FCC 92 - 178	2629
FCC 92 - 179	2618
FCC 92 - 181	2677
FCC 92 - 186	2696
FCC 92 - 187	2700
FCC 92 - 188	2703
FCC 92 - 190	2683
FCC 92 - 191	2695
FCC 92 - 192	2633
FCC 92 - 193	2639
FCC 92 - 196	2718
FCC 92 - 199	2716
FCC 92D - 29	2472
FCC 92D - 30	2528
FCC 92D - 31	2591
FCC 92R - 27	2498
FCC 92R - 28	2499
FCC 92R - 29	2501
FCC 92R - 30	2493
FCC 92R - 32	2573

Table of Cases by Docket Number
Volume 7
Issue 9

Docket Number				Page
CC	Dkt.No.86	-	10	2723
CC	Dkt.No.88	-	2	2649
CC	Dkt.No.88	-	245	2579
CC	Dkt.No.90	-	124	2609
CC	Dkt.No.90	-	132	2677
CC	Dkt.No.91	-	64	2600
CC	Dkt.No.92	-	24	2653
CC	Dkt.No.92	-	90	2736
CC	Dkt.No.92	-	91	2604
CC	Dkt.No.92	-	101	2724
GC	Dkt.No.92	-	52	2664
MM	Dkt.No.84	-	115	2625
MM	Dkt.No.86	-	510	2633
MM	Dkt.No.87	-	73	2555
MM	Dkt.No.87	-	455	2557
MM	Dkt.No.87	-	455	2642
MM	Dkt.No.87	-	486	2557
MM	Dkt.No.88	-	126	2711
MM	Dkt.No.88	-	315	2708
MM	Dkt.No.88	-	420	2716
MM	Dkt.No.88	-	487	2528
MM	Dkt.No.90	-	8	2493
MM	Dkt.No.90	-	22	2644
MM	Dkt.No.90	-	80	2499
MM	Dkt.No.90	-	108	2573
MM	Dkt.No.90	-	352	2629
MM	Dkt.No.90	-	402	2501
MM	Dkt.No.90	-	433	2472
MM	Dkt.No.90	-	617	2552
MM	Dkt.No.91	-	28	2586
MM	Dkt.No.91	-	84	2591
MM	Dkt.No.91	-	84	2631
MM	Dkt.No.91	-	140	2755
MM	Dkt.No.91	-	290	2498
MM	Dkt.No.91	-	298	2554
MM	Dkt.No.92	-	14	2705
MM	Dkt.No.92	-	51	2654
MM	Dkt.No.92	-	89	2550
MM	Dkt.No.92	-	93	2706
MM	Dkt.No.92	-	94	2713
PR	Dkt.No.91	-	62	2718
PR	Dkt.No.91	-	167	2618

Federal Communications Commission Record

Table of Cases by Rulemaking Number
Volume 7
Issue 9

Rulemaking Number	Page
RM - 4961	2555
RM - 5286	2555
RM - 5291	2555
RM - 5314	2555
RM - 5339	2555
RM - 5381	2555
RM - 5411	2555
RM - 5421	2555
RM - 5508	2555
RM - 5615	2555
RM - 5899	2557
RM - 5899	2642
RM - 5938	2557
RM - 5980	2555
RM - 6013	2579
RM - 6142	2711
RM - 6223	2557
RM - 6223	2642
RM - 6224	2557
RM - 6224	2642
RM - 6225	2557
RM - 6225	2642
RM - 6226	2557
RM - 6226	2642
RM - 6242	2557
RM - 6278	2557
RM - 6308	2708
RM - 6532	2708
RM - 7111	2642
RM - 7194	2644
RM - 7359	2644
RM - 7406	2718
RM - 7561	2708
RM - 7564	2552
RM - 7584	2586
RM - 7739	2664
RM - 7740	2664
RM - 7741	2664
RM - 7803	2554
RM - 7884	2705
RM - 7950	2706
RM - 7955	2713
RM - 7964	2550

Table of Cases by City
Volume 7
Issue 9

City/State	Page	City/State	Page
Abilene, TX	2586	Eastsound, WA	2542
Alachua, FL	2493	Eden Prairie, MN	2471
Alice, TX	2507	El Dorado, AR	2555
Alice, TX	2509	Fosston, MN	2550
Amarillo, TX	2498	Friday Harbor, WA	2479
Ashland, WI	2705	Fulton, TX	2624
Avon Park, FL	2557	Goodlettsville, TN	2528
Avon Park, FL	2642	Hammond, OR	2481
Bainbridge, GA	2557	Hampton, AR	2555
Baltimore, MD	2623	Hardinsburg, KY	2708
Ben Bolt, TX	2543	Harrison, AR	2555
Benton, AR	2555	Hawesville, KY	2708
Big Bear Lake, CA	2696	Helen, GA	2501
Bloomfield, IN	2708	Holiday, FL	2557
Churchville, MD	2534	Holiday, FL	2642
Churchville, MD	2536	Homer, LA	2555
Churchville, MD	2538	Huntingburg, IN	2708
Churchville, MD	2530	Huntsville, AR	2555
Churchville, MD	2532	Iuka, MS	2691
Churchville, MD	2567	Kirkland, WA	2540
Churchville, MD	2569	Lajas, PR	2633
Churchville, MD	2561	Lake George, NY	2554
Churchville, MD	2511	Lakeland, FL	2687
Churchville, MD	2513	Lewiston, ME	2545
Churchville, MD	2515	Live Oak, FL	2557
Churchville, MD	2517	Live Oak, FL	2642
Churchville, MD	2519	Longview, TX	2629
Churchville, MD	2521	Loogootee, IN	2708
Churchville, MD	2523	Los Angeles, CA	2716
Churchville, MD	2482	Melville, NY	2491
Churchville, MD	2484	Mena, AR	2555
Churchville, MD	2486	Monrovia, CA	2547
Churchville, MD	2488	Monterey, TN	2648
Churchville, MD	2565	Morrisville, VT	2700
Clarksville, AR	2555	Mount Vernon, TX	2694
Colorado City, TX	2586	Mt. Juliet, TN	2591
Corvallis, OR	2468	Mt. Juliet, TN	2631
Crawfordsville, FL	2557	Newark, NJ	2625
Cross City, FL	2557	Obion, TN	2644
Cross City, FL	2642	Overland Park, KS	2546
Dallas, TX	2490	Ozark, AR	2555
Dardanelle, AR	2555	Paintsville, KY	2472

City/State	Page
Perry, FL	2557
Perry, FL	2642
Philpot, KY	2711
Quincy, FL	2557
Sarasota, FL	2557
Sarasota, FL	2642
Scottsburg, IN	2708
Sebastopol, CA	2703
Seymour, WI	2499
Sherwood, AR	2555
Springfield, MN	2713
Sumter, SC	2573
Tahlequah, OK	2552
Tallahassee, FL	2557
Tampa, FL	2571
Thomasville, GA	2557
Thomasville, GA	2642
Tiptonville, TN	2644
Tulsa, OK	2689
Warner Robins, GA	2639
Weatherford, TX	2588
Zion, IL	2572

Federal Communications Commission Record

Subject Index
Volume 7
Issue 9

Subject	Page
Adjudication	
Burden of proof	2528
Administrative Law Judge Decision	
	2716
Abuse of process	2633
Distribution of broadcast facilities	2625
Financial qualifications	2499, 2629
Integration of ownership into management, quantitative aspect	2493
Misrepresentation and lack of candor	2633
Orders or Notices	
Programming, specialized	2472
Review Board or Commission Decision	
Financial qualifications	2591
Integration of ownership into management, qualitative experience	2591
Reopening of record	2472, 2528
Antenna Structures, Construction and Marking	
Aviation red obstruction lighting	
Over 300' and up through 137.16 meters (450),	2534, 2536, 2538, 2543 2530, 2532, 2567, 2569 2561, 2563, 2511, 2515 2517, 2519, 2521, 2523 2482, 2484, 2488
Over 450' and up through 182.88 meters (600')	2694
Over 600' and up through 228.60 meters (750')	2530
Specifications for obstruction marking/lighting	
Specifications to be used, more	2534, 2536, 2538, 2543 2530, 2532, 2567, 2569 2561, 2563, 2511, 2515 2517, 2519, 2521, 2523 2482, 2484, 2486, 2486 2488
Broadcast Radio Services - General Rules	
Applications for authorization	
Amendment of applications	2629, 2700, 2703
Conflicts in applications, agreement for removing	2631
FM broadcast and FM translator stations applications: processing	2700, 2703
Public inspection file of commercial stations, local	2755, 2689
Program contents	
Contests	2648
Lottery information	2623

Subject	Page
Records kept by stations	
Logs, entries in	2689
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	2550, 2705, 2706, 2708, 2711, 2713, 2552, 2554, 2586, 2557, 2642, 2644
Broadcasting - TV Stations	
Technical considerations	
Transmitter location and antenna system	2696
Cable Television Service	
Markets and services	
Signals significantly viewed, method to determine	2525
Network nonduplication protection	
Signals, priority of	2525
Commission Organization	
Common Carrier Bureau	
Functions: recommend/administer policies for services for hire	2610, 2614
Delegations of authority - Chief Engineer	
Authority delegated with concurrence of General Counsel	2650
Authority delegated, listing of particular	2650
Delegations of authority - Chief, Common Carrier	
Limitations on delegated authority	2599, 2600, 2650, 2610, 2614
Shared delegated authority with Chief, Private Radio	2572, 2479, 2481
Delegations of authority - Chief, Mass Media Bureau	
Commission en banc, matters to be referred to the	2650
Delegations of authority - Chief, Private Radio Bureau	
Commission en banc, matters to be referred to the	2650
Delegations of authority - Field Operations Bureau	
Commission en banc, matters to be referred to the	2650
Delegations of authority - General Counsel	
Authority delegated, listing of	2695
Communications Act of 1934	
Common Carriers	
Complaints to the commission	2675
Extension of lines, certificate for	2636, 2637
Hearing as to lawfulness of new charges; suspension of charges	2724
Pole attachments, regulation of	2610, 2614
Service and charges	2724
Penal provisions; forfeitures	

Subject	Page
Rebates and offsets, forfeitures in cases of	2648
Radio, provisions relating to	
Applications;form of and conditions attached to licenses	2664
License for radio communication or transmission of energy	2624
Sanctions, administrative	2698, 2687
Frequency Allocations and Radio Treaty Matters	
Equipment authorization procedures: conditions on grants	
Authorization prohibited, transfer of	2692
Identification of equipment: when new authorization required	2692
Marketing of radiofrequency devices	
Devices not approved, limitations on radiofrequency	2547, 2687, 2692
Maritime Services	
Frequencies - radiotelephony	
Private communications frequencies	2618
Safety watches	
Ship: Bridge to Bridge Act	2618
Ship: voluntary vessels	2618
Operational-Fixed Microwave Service, Private	
Applications, authorizations, notifications	
Time schedule of operations	2471
Practice and Procedure	
Application procedures, general	2675
Detailed procedures; cross-references	2505
Common carriers: complaints	
Formal or informal	2675, 2646, 2647, 2506
Common carriers: complaints, formal	
Supplemental complaints	2675
Common carriers: tariffs	
Filing, petitions related to new	2715
Ex parte presentations, general information	
Purpose: to specify standards of conduct and procedure	2604
Fees filed with Commission: schedules: general information	
Special temporary authority (sta) or waiver, general rules for	2469
Hearing proceedings: presiding officer's rulings	
Final ruling, appeal from	2498
Interlocutory ruling, appeal from	2631
Pleadings, briefs	
Extension of time, motions for	2609
Pleadings and filing periods, provisions regarding	2674

Subject	Page
Pole attachment (cable television) complaints: procedures	
Complaints, contents of	2610, 2614
Proceedings, miscellaneous	
Forfeiture proceedings	2534, 2536, 2538, 2543 2507, 2624, 2530, 2532 2567, 2569, 2561, 2563 2511, 2513, 2515, 2517 2519, 2521, 2523, 2482 2484, 2486, 2488, 2687 2689, 2692, 2694
Reconsideration/review of Commission action	
Actions by delegated authority, application for review	2625, 2629, 2695
Reconsideration of a final FCC action, petition	2687, 2689, 2692, 2694
Public Mobile Service	
Applications and licenses-processing	
Mutually exclusive applications	2548
Rates of Return	
Reports	
Rate of return reports for common and exchange carriers	2735
Statutory Citations Other than Communications	
Implementation of policy	2636, 2637
Tariffs (Schedules of Rates and Regulations)	
Specific tariff publications	
Notice requirements	2603
Telecommunications Companies: Classes A and B	
Nonregulated activities	2590

TABLE OF STATUTORY AND RULE PROVISIONS

	Page
000.091 Functions of the Bureau	2610
000.091 Functions of the Bureau	2614
000.241 Chief Engineer Authority delegated	2650
000.243 Authority delegated to the Chief Engineer upon secur	2650
000.251 Authority Delegated, General Counsel	2695
000.283 Chief, Mass Media Bureau Authority delegated	2650
000.291 Authority delegated	2610
000.291 Authority delegated	2614
000.291 Chief, Common Carrier Bureau Authority delegated	2650
000.311 Field Operations Bureau Authority delegated	2650
000.331 Chief, Private Radio Bureau Authority delegated	2650
001.1105(16)(a) Schedule of charges for common carrier servi	2469
001.1107 Payment of charges	2639
001.1107(a)(2) Payment of charges, Fee Form Requirement	2469
001.1114 Penalty for late or insufficient payments	2639
001.115 Application for Review	2625
001.115 Application for Review	2629
001.115 Application for review of action taken pursuant to	2695
001.1404 Complaint	2610
001.1404 Complaint	2614
001.177 Formal or informal complaints	2505
001.177 Formal or informal complaints	2652
001.2002 Applicants required to submit information	2641
001.301 Appeal from presiding officer's interlocutory ruling	2631
001.302 Appeal, Dismissed	2498
001.711 Formal or informal complaints	2506
001.711 Formal or informal complaints	2646
001.711 Formal or Informal Complaints	2675
001.720 General Pleading Requirements	2675
001.727 Motions	2675
001.773 Petitions for susp. or rej. of new tariff filings	2715
002.803 - Marketing uncertified computer peripherals	2490
002.803 - Marketing uncertified computers	2491
007.011 Formal or informal complaints	2647
017.023 Painting of Antenna	2482
017.023 Painting of Antenna	2484
017.023 Painting of Antenna	2486
017.023 Painting of Antenna	2488
017.023 Painting of Antenna	2511
017.023 Painting of Antenna	2513
017.023 Painting of Antenna	2515
017.023 Painting of Antenna	2517
017.023 Painting of Antenna	2519
017.023 Painting of Antenna	2521
017.023 Painting of Antenna	2523
017.023 Painting of Antenna	2530
017.023 Painting of Antenna	2532
017.023 Painting of Antenna	2534
017.023 Painting of Antenna	2536
017.023 Painting of Antenna	2538

017.023 Painting of Antenna 2543
017.023 Painting of Antenna 2561
017.023 Painting of Antenna 2563
017.023 Painting of Antenna 2565
017.023 Painting of Antenna 2567
017.023 Painting of Antenna 2569
017.026 Lighting of Antenna 2482
017.026 Lighting of Antenna 2484
017.026 Lighting of Antenna 2486
017.026 Lighting of Antenna 2488
017.026 Lighting of Antenna 2511
017.026 Lighting of Antenna 2513
017.026 Lighting of Antenna 2515
017.026 Lighting of Antenna 2517
017.026 Lighting of Antenna 2519
017.026 Lighting of Antenna 2521
017.026 Lighting of Antenna 2523
017.026 Lighting of Antenna 2530
017.026 Lighting of Antenna 2532
017.026 Lighting of Antenna 2534
017.026 Lighting of Antenna 2536
017.026 Lighting of Antenna 2538
017.026 Lighting of Antenna 2543
017.026 Lighting of Antenna 2561
017.026 Lighting of Antenna 2563
017.026 Lighting of Antenna 2565
017.026 Lighting of Antenna 2567
017.026 Lighting of Antenna 2569
017.048 Notification of Improper Function Lights 2482
017.048 Notification of Improper Function Lights 2484
017.048 Notification of Improper Function Lights 2486
017.048 Notification of Improper Function Lights 2488
017.048 Notification of Improper Function Lights 2507
017.048 Notification of Improper Function Lights 2509
017.048 Notification of Improper Function Lights 2511
017.048 Notification of Improper Function Lights 2513
017.048 Notification of Improper Function Lights 2515
017.048 Notification of Improper Function Lights 2517
017.048 Notification of Improper Function Lights 2519
017.048 Notification of Improper Function Lights 2521
017.048 Notification of Improper Function Lights 2523
017.048 Notification of Improper Function Lights 2530
017.048 Notification of Improper Function Lights 2532
017.048 Notification of Improper Function Lights 2534
017.048 Notification of Improper Function Lights 2536
017.048 Notification of Improper Function Lights 2543
017.048 Notification of Improper Function Lights 2561
017.048 Notification of Improper Function Lights 2563
017.048 Notification of Improper Function Lights 2565
017.048 Notification of Improper Function Lights 2567
017.048 Notification of Improper Function Lights 2569
017.048 Notification of Improper Functioning Lights 2538
017.050 Cleaning and Repainting 2482
017.050 Cleaning and Repainting 2484

017.050 Cleaning and Repainting 2486
017.050 Cleaning and Repainting 2488
017.050 Cleaning and Repainting 2511
017.050 Cleaning and Repainting 2513
017.050 Cleaning and Repainting 2515
017.050 Cleaning and Repainting 2517
017.050 Cleaning and Repainting 2519
017.050 Cleaning and Repainting 2521
017.050 Cleaning and Repainting 2523
017.050 Cleaning and Repainting 2530
017.050 Cleaning and Repainting 2532
017.050 Cleaning and Repainting 2534
017.050 Cleaning and Repainting 2536
017.050 Cleaning and Repainting 2538
017.050 Cleaning and Repainting 2543
017.050 Cleaning and Repainting 2561
017.050 Cleaning and Repainting 2563
017.050 Cleaning and Repainting 2565
017.050 Cleaning and Repainting 2567
017.050 Cleaning and Repainting 2569
022.031 Mutually exclusive applications 2548
022.903 Cellular system service areas 2548
025.110 Filing of applications, fees, and number of copies. 2469
025.140 Qualifications of domestic fixed-satellite space sta 2469
032.014 Regulated Accounts 2590
032.023 Nonregulated Activities 2590
043.051 Contracts and Concessions 2580
064.1001 International Settlements Policy & Waivers 2580
064.901 Allocation of Costs 2590
073.1211 Broadcast of Lottery Information 2623
073.1216 Licensee-conducted contest 2648
073.202 FM Table of Allotments 2552
073.202 FM Table of Allotments 2554
073.202 FM Table of Allotments 2644
073.202 FM Table of Allotments 2705
073.202 FM Table of Allotments 2706
073.202 FM Table of Allotments 2708
073.202 FM Table of Allotments 2711
073.202 FM Table of Allotments 2713
073.202, FM Table of Allotments 2555
073.202, FM Table of Allotments 2557
073.202, FM Table of Allotments 2642
073.3522 Amendment of Applications 2700
073.3522 Amendment of Applications 2703
073.3522(b)(1) Post Designation Amendment 2629
073.3525 Agreements for removing application conflicts 2631
073.3555 Multiple Ownership 2654
073.3573 Processing FM Applications 2700
073.3573 Processing FM Applications 2703
073.4163 Noncommercial Nature of Ed. B/C Stations 2588
073.503 Noncommercial FM Service; Promotional Announcements 2588
073.685 Transmitter location and antenna system. 2696
076.054 Significantly viewed signals; method to be followed. 2525
076.092 Network non-duplication; extent of protection. 2525

076.156 Exceptions. 2525
080.310 Watch required by voluntary vessels 2618
080.369 Distress, urgency, safety, call and reply frequencie 2618
080.373 Private communications frequencies 2618
090.069 Video Production Radio Service 2718
094.51(a) Time in which station must be in operation 2471
100.010 License Conditions 2728
300.208 Complaints 2675
300.214 Extension of Lines 2636
300.214 Extension of Lines 2637
300.224 Regulation of Pole Attachments 2610
300.224 Regulation of Pole Attachments 2614
300.301 License for Radio Communications 2624
300.309 Action Upon Applications; Form and Conditions Attach 2664
300.312 Administrative sanctions 2698
300.399B Public B/C Stations; Advertisements 2588
300.503(b) Forfeiture 2648
300.503(b) Forfeitures 2588
300.750 International Maritime Satellite Telecommunications 2579
301 - Unauthorized Operation 2479
301 - Unauthorized Operation 2481
301 - Unauthorized Operation 2540
301 - Unauthorized Operation 2542
301 - Unlicensed operation 2571
301 - Unlicensed operation 2572
301, Unauthorized Operation, CB Overpower 2545
301; Pirate Radio 2546
301; Unlicensed Operation 2546
325 - False Distress 2572
400.181304 Broadcasting Lottery Information 2623
400.201 Implementation of Policy 2636
400.201 Implementation of Policy 2637
400.401 Applicability of Communications Act of 1934 2636
400.401 Applicability of Communications Act of 1934 2637
47 C.F.R. Section 0.291 delegated authority 2598
47 C.F.R. Section 0.291 delegated authority 2599
47 C.F.R. Section 0.291 delegated authority 2600
47 CFR Section 69 2723
47 CFR § 64.702, Furnishing of Enhanced Services and CPE 2649
500.030 - Integration, Qualitative 2528
500.140 Comparative 2472
500.2005 Integration of Ownership Into Management, Qualitati 2591
500.2045 Diversification of Control of Mass Media 2591
500.2170 Financial Qualifications 2591
500.3005 Integration of Ownership Into Mgmt., Qualitative As 2493
500.3035 Integration of Ownership Into Mgmt., Quantitative A 2493
500.3040 Integration, Quantitative, Effectuation 2501
500.3079 Hearing procedure 2716
500.3085 307b, Distribution of Broadcast Facilities 2625
500.3100 Abuse of Process 2633
500.3125 Misrepresentation and lack of candor 2633
500.3170 Financial Qualifications 2493
500.3170 Financial Qualifications 2499
500.3170 Financial Qualifications 2573

500.3170 Financial Qualifications 2629
500.3180 Site Availability or Suitability 2633
500.3200 Reopening of Record 2633
500.3210 Standing 2625
73.202 FM Table of Allotments 2550
73.202 FM Table of Allotments 2586
Character Qualifications in Broadcast Licensing 2728
Direct Broadcast Satellite, Application for CP 2728
Marketing uncertified computers§302; §2.803 2547
Part 68 Terminal Equipment 2736
Sec. 061.045 Adjustments to the PCI for LECs 2724
Sec. 300.201 Service and Charges 2724
Sec. 300.204 Hearing as to Lawfulness of New Charges; Suspen 2724
Sec. 65.600(d)(1) Rate of Return Reports 2735
Section 001.046 Motion for Extension of Time 2609
Section 1. 45 Pleadings; filing periods 2674
Section 1.1200 Ex Parte Communications 2604
Section 1.46 Motions for Extension of Time 2653
Section 61.58 Notice Requirements 2603
Section 69.3(a) - Annual Access Tariff 2640
§1.080 Forfeiture Proceedings 2482
§1.080 Forfeiture Proceedings 2484
§1.080 Forfeiture Proceedings 2486
§1.080 Forfeiture Proceedings 2488
§1.080 Forfeiture Proceedings 2507
§1.080 Forfeiture Proceedings 2509
§1.080 Forfeiture Proceedings 2511
§1.080 Forfeiture Proceedings 2513
§1.080 Forfeiture Proceedings 2515
§1.080 Forfeiture Proceedings 2517
§1.080 Forfeiture Proceedings 2519
§1.080 Forfeiture Proceedings 2521
§1.080 Forfeiture Proceedings 2523
§1.080 Forfeiture Proceedings 2532
§1.080 Forfeiture Proceedings 2534
§1.080 Forfeiture Proceedings 2536
§1.080 Forfeiture Proceedings 2538
§1.080 Forfeiture Proceedings 2543
§1.080 Forfeiture Proceedings 2561
§1.080 Forfeiture Proceedings 2563
§1.080 Forfeiture Proceedings 2565
§1.080 Forfeiture Proceedings 2567
§1.080 Forfeiture Proceedings 2569
§1.080 Forfeiture Proceedings 2624
§1.080 Forfeiture Proceedings 2687
§1.080 Forfeiture Proceedings 2689
§1.080 Forfeiture Proceedings 2691
§1.080 Forfeiture Proceedings 2692
§1.080 Forfeiture Proceedings 2694
§1.106 Petitions for Reconsideration 2687
§1.106 Petitions for Reconsideration 2689
§1.106 Petitions for Reconsideration 2691
§1.106 Petitions for Reconsideration 2692
§1.106 Petitions for Reconsideration 2694

§1.80 Forfeiture Proceedings 2530
§17.027 Specifications for lighting of antenna 2694
§17.048 Notification of improper functioning lights 2694
§2.803 - Marketing uncertified computers 2468
§2.803 Equipment Requiring Commission Approval 2687
§2.803 Equipment Requiring Commission Approval 2692
§2.929 Nonassignability of equipment authorization 2692
§2.933 Change in identification of equipment 2692
§300.312 Administrative Sanctions 2687
§73.1820 Station log 2689
§73.3526 Public inspection file 2689
§73.932 Attention Signal Transmission 2691
§73.961 Tests of Emergency Broadcast System 2691

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Computer Exchange
Corvallis, Oregon

NOTICE OF APPARENT LIABILITY

Adopted: March 17, 1992; Released: April 20, 1992

By the Commission:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), to The Computer Exchange for willful violations of Section 302(b) of the Communications Act, 47 U.S.C. §302(b), and Section 2.803 of the Commission's Rules, 47 C.F.R. §2.803. On July 30, 1991, The Computer Exchange offered for sale Class B personal computers for which no equipment authorization had been granted. *See* 47 C.F.R. §§ 15.3(s) and 15.101(a).

2. The appropriate amount of forfeiture for this violation is $14,000.

II. BACKGROUND

3. The Computer Exchange is a retailer of personal computers. Personal computers are defined to be Class B digital devices under Part 15 of the Commission's Rules. Personal computers must receive Commission certification before they may be offered for sale. 47 C.F.R. §§ 2.803 & 15.101(a).

4. On July 30, 1991, an inspector from the Commission's Field Operations Bureau (FOB) visited The Computer Exchange store. He found offered for sale a 286-12 MHz personal computer which contained no label to indicate that it was FCC certified. He also found a 386-25 MHz personal computer improperly labelled as a Class A digital device.

III. DISCUSSION

5. The Computer Exchange has clearly violated Section 302(b) of the Communications Act and Section 2.803 of the Rules in the case of the 286-12 MHz computer. The 386-25 MHz computer, although more powerful and expensive, is clearly considered in today's marketplace a personal computer and thus a Class B digital device requiring certification. *See generally* 47C.F.R. § 15.3(s).

6. The violation is willful. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Record 4695 (1991), *recon. pending*, the base forfeiture amount is $7,000 for marketing of unauthorized equipment.

7. Because the violation was repeated with two separate types of computers, it is consistent with the *Policy Statement* to assess a forfeiture of $14,000 for these violations.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47C.F.R. §1.80, that The Computer Exchange IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of $14,000 for marketing uncertified personal computers in violation of Section 302(b) of the Communications Act and Section 2.803 of the Commission's Rules. The amount specified was determined after consideration of the factors set forth in Section 503(b) of the Communications Act.

9. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47C.F.R. § 1.80(f)(3), that The Computer Exchange shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

Send written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: NAL response
Room 744
1919 M Street, NW
Washington, D.C. 20554

10. IT IS FURTHER ORDERED that the Secretary shall send by registered mail a copy of this Notice of Apparent Liability for Monetary Forfeiture to The Computer Exchange, 350 S.W. Jefferson Avenue, Corvallis, Oregon, 97333.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

LEOSAT Corporation File No. 12-DSS-P-91(2)

For Authority to Construct a
Low-Earth Orbit Domestic
Satellite System

ORDER

Adopted: April 10, 1992; Released: April 20, 1992

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. LEOSAT Corporation (LEOSAT) has applied for authority to construct a domestic low-Earth orbit (LEO) satellite system to operate in the 137.0-138.0 MHz and 148.0-149.9 MHz frequency bands. For the reasons set forth below, we conclude that LEOSAT's application was not timely filed, and will be dismissed.

II. BACKGROUND

2. On February 28, 1990, Orbital Communications Corp. (ORBCOMM) filed an application to construct a LEO satellite system operating below 1 GHz (small LEOs). On May 11, 1990, STARSYS, Inc. (STARSYS) became the second small LEO applicant, and a cut-off date of September 21, 1990 was established for the filing of applications to be considered concurrently with those of ORBCOMM and STARSYS.[1] On that date, LEOSAT filed its above-referenced application.[2] This application was not accompanied by an FCC Fee Form 155[3] and, accordingly, was returned to the company by the fee processing staff. On October 12, 1990, LEOSAT resubmitted its application with the required form and fee. On July 23, 1991, LEOSAT's application was placed on Public Notice as conditionally accepted for filing.[4] Individual petitions to deny LEOSAT's application were filed by all three competing applicants (ORBCOMM, STARSYS and VITA) claiming, among other things[5] that LEOSAT's application was not timely filed and should be dismissed.

III. DISCUSSION

3. Section 1.1105(16)(a) of the Commission's rules[6] requires the submission of an FCC Fee Form 155 with any application to provide domestic satellite service. When enacting this requirement, the Commission noted that the submission of this form was essential to the efficient processing of fees.[7] Accordingly, the Commission amended Section 1.1107 of the rules to state that "(a) after May 21, 1990...(2) applications submitted without FCC Form 155 will be dismissed."[8] LEOSAT's September 21, 1990 application was not accompanied by Form 155. The application thus was returned as unacceptable for filing in accordance with Section 1.1107. Because LEOSAT did not resubmit its application with the proper fee form until October 12, 1990, it missed the filing cut-off date established for the small LEO processing group.[9]

4. The requirement that domestic satellite applicants file an FCC Form 155 with each application had been in effect for four months when LEOSAT filed its application in September 1990.[10] In its latest *Fees* order, [11] which was adopted two days after the filing deadline for small LEO applications, the Commission noted that "we have issued numerous *Public Notices*, provided pamphlets, held workshops and set up a fee information hotline to ensure that the public is kept fully informed of the proper fee filing procedures." The Commission concluded that, after consideration of all comments filed in regard to the fee form regulations, it would not adopt a more lenient policy that would allow applicants to correct even minor form errors. Accordingly, we will not permit the total absence of a fee form subsequently to be corrected, and the application accepted as timely.

5. In sum, to insure its efficient processing of fees, the Commission has adopted an unambiguous regulation requiring the submission of a standard, properly completed fee processing form. LEOSAT's application, which was not accompanied by such a form, was correctly returned in accordance with this regulation. LEOSAT's application therefore was not filed in time to meet the deadline for inclusion in the current small LEO processing group, and will be dismissed without prejudice.

---

[1] FCC Public Notice, Report No. DS-982 (released July 16, 1990) (the cut-off notice); Erratum, FCC Public Notice, Report No. DS-985 (released July 25, 1990).

[2] A fourth small LEO application was timely filed by Volunteers in Technical Assistance (VITA).

[3] LEOSAT asserts, however, that it did submit the proper fee at that time.

[4] FCC Public Notice, Report No. DS-1067 (released April 23, 1991). Conditional acceptance does not preclude further Commission action on an application, including its dismissal, if the application is not in accordance with Commission rules. *See e.g.* Section 25.150 of the Commission's rules, 47 C.F.R. §25.150.

[5] The three competing applicants further allege that LEOSAT's application should be dismissed or denied for technical, legal and/or financial reasons. Because we are dismissing LEOSAT's application on procedural grounds, we will not discuss these remaining allegations herein.

[6] 47 C.F.R. §1.1105(16)(a).

[7] Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558, 3569 (1990).

[8] 47 C.F.R. §1.1107(a)(2).

[9] LEOSAT has not requested a waiver of the cut-off date. However, if it were to request such a waiver, the company would have the heavy burden of showing the existence of circumstances sufficient to justify such a waiver, as contemplated by *WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir.), *cert. denied*, 409 U.S. 1027, 93 S. Ct. 461, 34 L. Ed. 2d 321 (1972).

[10] When ORBCOMM and STARSYS filed their applications, no fee form was required.

[11] Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 6 FCC Rcd 5919, 5923 (1990).

IV. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED that pursuant to the authority contained in Section 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. §309(d), and Section 0.291 of the Commission's rules on the delegation of authority, 47 C.F.R. §0.291, the application of LEOSAT Corporation to construct a low-Earth orbit domestic satellite system, File No. 12-DSS-P-91(2), IS DISMISSED without prejudice.

7. IT IS FURTHER ORDERED that the Petitions to Deny the application of LEOSAT Corporation filed by Orbital Communications Corp., STARSYS, Inc. and Volunteers in Technical Assistance ARE GRANTED to the extent discussed above.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

Cooperative Power Association
Eden Prairie, MN

File No. 92069

For Waiver of Section 94.51(a)
of the Rules

WAIVER

Adopted: April 13, 1992; **Released: April 20, 1992**

By the Chief, Land Mobile and Microwave Division:

1. Cooperative Power Association (CPA) seeks waiver of Section 94.51(a) of the Commission's Rules, 47 C.F.R. § 94.51(a), to extend the construction period for its proposed multiple address system (MAS)[1] in the Private Operational-Fixed Microwave Service. Section 94.51(a) authorizes a 12 month construction period. CPA requests a September 1, 1994, deadline.

2. CPA is an electric power generation and transmission cooperative, financed by the Rural Electrification Administration. It states that it serves 17 distribution cooperatives located in rural Minnesota, which in turn serve over 178,000 consumers in southern and western Minnesota. Customers operate hospitals, elevators, traffic signals, and water and sewage systems, among other things, and power outages, CPA urges, may thus have severe life threatening consequences.

3. CPA states that its proposed new system will greatly improve the efficiency and safety of its operations by contributing to more rapid and efficient load management and by accelerating detection of electrical outages. According to CPA, reporting time for power outages will be reduced from 20 minutes to 10 to 15 seconds, with a complementary reduction in outage time. CPA's energy conservation strategy will also be furthered by the new system, which will assist in effective load management.

4. As good cause for an extended construction schedule, CPA cites first the complexity of its planned system, which consists of 41 stations polling data from 246 remote sites. CPA notes also the necessity of a smooth and orderly transition from the old to the new system, with old components gradually phased out as new components are introduced. Severe budgetary constraints limit the amount of manpower available for the project, CPA adds, while seasonal weather conditions restrict actual available construction time.

5. We will grant the requested waiver. As CPA notes, citing *Advanced Train Control System*, 3 FCC Rcd 427 (1988), we have granted extended construction periods to systems that serve large numbers of mobile units, are complex and require wide-area coordination. CPA's system clearly falls into this category, while at the same time promising significant benefits to the public. Accordingly, pursuant to Sections 0.331 and 1.3 of the Rules, 47 C.F.R. §§ 0.331 and 1.3, the request for waiver of Section 94.51(a) of the Rules filed by Cooperative Power Association IS GRANTED. Cooperative Power Association will have until September 1, 1994, to construct the system proposed in its pending MAS applications. The Licensing Division will continue routine processing of the applications. When and if granted, CPA's licenses will be subject to this waiver and the extended implementation date of September 1, 1994.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile and Microwave Division

[1]CPA's pending MAS applications (File Nos. 766771 - 766779, 76681 - 766787, and 766789 - 766807) are being individually evaluated by our Licensing Division.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-433

In re Applications of

GARY SELLERS	File No. BPH-891215ML
B&G BROADCASTING, INC.	File No. BPH-891220MH
RAY EDMUND PRESTON, II	File No. BPH-891220MI

For Construction Permit for a
New FM Station on Channel 234C3
in Paintsville, Kentucky

Appearances

Gregory H. Guillot, Esq. on behalf of B&G Broadcasting, Inc., *Stanley G. Emert, Esq.* on behalf of Ray Edmund Preston, II, *John F. Garziglia, Esq., Howard J. Barr, Esq.* on behalf of Gary Sellers, and *Robert A. Zauner, Esq.* on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: April 3, 1992; Released: April 21, 1992

Preliminary Statement

1. By *Hearing Designation Order*, MM Docket No. 90-433 (released November 29, 1991) ("*HDO*"), the Commission designated for hearing four mutually exclusive applications for a new commercial FM broadcast station on Channel 234C3 (94.7 MHz) at Paintsville, Kentucky. The application of Morehead State University was dismissed by *Order*, FCC 91M-1825 (released June 7, 1991), leaving the following three applicants: Gary Sellers ("Sellers"); Ray Edmund Preston, II ("Preston"); and B & G Broadcasting, Inc. ("B & G").

2. The following issues for evidentiary resolution in this proceeding, along with the consideration of comparative coverage are:

> To determine which of the proposals would, on a comparative basis, better serve the public interest; and
>
> To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

3. A pre-hearing conference in this proceeding was held on January 31, 1991. Hearing sessions were held on June 24, and June 25, 1991, and the record was closed on June 25, 1991. *Order*, FCC 91M-2018 (released June 28, 1991).

Findings of Fact
Standard Comparative Issue

Gary Sellers

4. Gary Sellers is an individual applicant for the Federal Communications Commission's authorization to construct and operate a new FM station on Channel 234C3 at Paintsville, Kentucky (Sellers Ex. 1).

5. Mr. Sellers proposes to work full-time, no less than 40 hours per week on five or more days of each week in the position of general manager of his proposed new broadcast facility (*Id.*).

6. Mr. Sellers currently owns The Men's Shop, located in Paintsville, Kentucky (*Id.*). Mr. Sellers will sell the Men's Shop at or prior to the initiation of program test authority of his proposed new station (*Id.*). Additionally, Mr. Sellers will divest or disassociate himself from any other activities requiring more than ten hours of his time per month in order to effectuate his integration proposal (*Id.*).

7. Mr. Sellers is currently a resident of Paintsville and has been so since August, 1983 (*Id.*). Between August of 1983 and August of 1986, Mr. Sellers resided at Island Creek Road in Paintsville (*Id.*). From August 1986 to the present, he has resided at his residence at 709 Happy Hollow in Paintsville (*Id.*). Between August 1986 and December 1988, the mailing address of this latter residence was 551 Court Street, Paintsville (*Id.*). Only the mailing address was changed; not the place of residence (*Id.*). Both of these Paintsville residences are within the Paintsville city limits (*Id.*). Mr. Sellers has also proposed to continue to reside in Paintsville in the future (*Id.*).

8. Mr. Sellers has been civically involved within the community of license and within the station's proposed service area. These civic activities include active membership and participation in the following: Downtown Merchants Association between July, 1986 and March, 1991. Mr. Sellers served as president between March, 1990 and March, 1991. This organization was dissolved in March of 1991 and merged into the Paintsville Main Street program of which Mr. Sellers is a Board Member and a member of the promotion committee; the Paintsville Recreation Tourism Committee, member between January, 1989 and January, 1990; the Paintsville Utility Commission, member between February, 1990 and the present; the Paintsville Little League between March, 1986 and the present; (Mr. Sellers is a Board Member, Coach and Vice President of the Senior League Division); the Paintsville Athletic League between October, 1986 and the present (Mr. Sellers is a coach and the Treasurer). In addition to being a member of the First United Methodist Church of Paintsville, Kentucky, since approximately 1983, Mr. Sellers has been an Administrative Board Member and a Finance Committee Member since January, 1991. Mr. Sellers has also been a member of the Paintsville, PTA, November 1983-present; the Kiwanis International, member between October, 1986 and November, 1989 (*Id.*). Sellers seeks enhancement credit for the foregoing named civic participation.

9. Other than his present application for a construction permit for a new FM radio station at Paintsville, Kentucky, Mr. Sellers has no ownership interest or positional interest in any medium of mass communication, including any broadcast radio or television station, cable television system or newspaper (Sellers Ex. 3).

10. Mr. Sellers proposes to maintain auxiliary power facilities at the transmitter site and studio site to maintain service in the event of an interruption of electrical service (Sellers Ex. 4).

B&G Broadcasting, Inc.

11. B&G is a corporation organized pursuant to the laws of the Commonwealth of Kentucky (B&G Ex. 1, p. 1; B G Ex. 2, p. 1). B&G has only one class of stock -- common voting stock -- and all authorized, issued and outstanding shares of same have been issued to B&G principals Alan Burton ("Burton") and William D. Gibson ("Gibson") in equal amounts (B&G Ex. 1, p. 1; B&G Ex. 2, *et seq.*). The shareholders of B&G, their interests in and positions with the corporation, are as follows:

Alan Burton	President, Director and owner of 50 percent of all authorized, issued and outstanding shares of common stock.
William D. Gibson	Vice President, Secretary/Treasurer, Director and owner of 50 percent of all authorized, issued and outstanding shares of common voting stock.

(B&G Exs. 1 and 2; B&G Ex. 3, p. 1). Pursuant to the provisions of B&G's Bylaws, each shareholder is entitled to one vote on all matters of business for each share of stock held, and the number of corporate directors is set at two (B&G Ex. 2, p. 7).

12. B&G was formed by Burton and Gibson in 1983 (Tr. 56; B&G Ex. 2) for the purpose of acquiring and operating standard, daytime-only broadcast station, WKLW, in Paintsville, Kentucky (B&G Ex. 5, p. 4). Burton and Gibson had been old friends (Tr. 56).

13. B&G acquired WKLW in December, 1984, commenced station operations in March, 1985, and has owned and operated WKLW continuously since that time (B&G Ex. 3, p. 1). Gibson currently resides in Texas and never has worked with WKLW as an employee (Tr. 100, 117, 119), and receives no income from WKLW or B&G (Tr. 117, 122). Nevertheless, Gibson and Burton maintain frequent contact by telephone, and Burton keeps Gibson informed regarding WKLW's operations (Tr. 83, 121). Burton also discusses all major financial expenditures with Gibson (Tr. 86). Moreover, Gibson visits WKLW several times per year, and, since B&G's incorporation, has been physically present for each of B&G's annual shareholders' meeting, which are held at Burton's home (Tr. 83-85, 121, 127-128).

14. Burton first discovered the availability of the new FM broadcast channel at Paintsville at issue in this proceeding, and informed Gibson by telephone (Tr. 58). Gibson recommended B&G's current communications counsel for the preparation and prosecution of B&G's application (Tr. 58). Burton and Gibson discussed the location of B&G's proposed site, and when Gibson expressed his satisfaction with the site based upon his engineering background, Burton approached the site owner, Mr. Sturgill, to obtain assurance of its availability (Tr. 85-86; B&G Application p. 24). Burton physically prepared (*i.e.*, typed) B&G's estimated budget for the construction and operation of B&G's proposed FM facility, after discussing the figures involved with Gibson by telephone, and determining that Gibson was satisfied with them (Tr. 95, 97, 98, 99). Burton contacted Mr. Dennis Dorton, of Citizens National Bank in order to obtain B&G's loan commitment letter (Tr. 131). Gibson presented Citizens National Bank with a financial statement in 1985 (Tr. 135), and was a signator to B&G's prior loan with the bank, in connection with the initial construction of WKLW (*Id.*).

15. With the assistance of Gibson, Burton prepared (*i.e.*, typed) certain portions of B&G's FM application in draft form for submission to counsel (Tr. 93, 94). Gibson also participated in B&G's production of documents in the course of discovery herein (Tr. 132).

16. *Diversification.* B&G is the licensee of standard, daytime-only broadcast station WKLW (B&G Ex. 3, p. 1). Neither B&G, nor its principals, Burton and Gibson, hold any interest in any medium of mass communications other than WKLW(AM) (*Id.*). In the event that B&G's application in the instant proceeding is granted, B&G has pledged to divest itself of any and all interest in WKLW within three years from the commencement of operations of the proposed FM station pursuant to program test authority (*Id.*). Additionally, Burton and Gibson each have pledged to divest themselves of all interests in WKLW within three years of commencement of operations on the proposed FM station pursuant to program test authority, and to terminate any employment with WKLW upon the commencement of FM operations pursuant to program test authority (B&G Ex. 3, p. 2; B&G Ex. 4, p. 1; Tr. 51-52, 118, 120). Burton testified at the hearing that he already has spoken to people who will assume managerial responsibility for WKLW, once B&G's proposed FM station goes on the air (B&G Ex. 4, p. 1; Tr. 51-52, 101-102).

17. *Integration.* Alan Burton will serve as the full-time general manager of B&G's proposed station and will devote a minimum of 40 hours per week to his duties and responsibilities as general manager (B&G Ex. 4, p. 1). In this position, he will oversee daily station operations and will be responsible for overall station management, including budgeting, staffing and the supervision of all programming, news, sales and office aspects of station operations (*Id.*). Burton also will make final decisions on major expenditures and program implementations, and will be responsible for implementing the station's Equal Opportunity Program (*Id.*).

18. William D. Gibson will serve full-time, *e.g.*, at least 40 hours per week, as Chief Engineer and Program Director of B&G's proposed station (B&G Ex. 4, p. 1). He will be in charge of all engineering and technical aspects of station operation, make decisions regarding station programming, and oversee on-air talent (*Id.*; Tr. 140, 141).

19. In order to effectuate B&G's integration proposal, both Burton and Gibson have pledged to terminate any employment with WKLW upon the commencement of FM operations pursuant to program test authority (B&G Ex. 4, 1). In this regard, B&G's principals intend to simulcast the signal of B&G's proposed FM facility over WKLW upon the commencement of FM operations, and hire additional personnel to oversee the WKLW simulcast operations (*Id.*;

Tr. 52-53). Burton testified at the hearing that he already has spoken to people who will assume managerial responsibility for WKLW, once B&G's proposed FM station goes on the air B&G Ex. 4, p. 1; Tr. 51-52, 101-102). Burton's and Gibson's participation in WKLW following the commencement of FM operations thus shall be limited to the duties inherent to their positions as shareholders, officers and directors of B&G, until such time as WKLW is divested completely, pursuant to the commitments undertaken by B&G and its principals (B&G Ex. 4, pp. 1-2).

20. In order to effectuate his integration proposal, Gibson has pledged to terminate his present employment and relocate to an address within the service area of B&G's proposed station in the event that B&G's application is granted (B&G Ex. 4, p. 2; B&G Ex. 6, p. 2). Gibson already has notified his present employer of his intentions in this regard, and has received written confirmation therefrom that his intentions are understood (B&G Ex. 4, p. 2). Gibson already frequents Paintsville, visiting the community and its surrounding area approximately four to five times per year (*Id.*; Tr. 85). These visits are not occasioned only by virtue of Gibson's interest in WKLW; Gibson's parents currently reside in Prestonburg, Kentucky, at an address located within the 70 dbu contour of B&G's proposed station, and his wife's parents also live nearby (*Id.*). Additionally, Gibson's only child, a son, lives four or five miles from Paintsville, in Auxier, Kentucky (*Id.*). Gibson's current intention, should B&G's application be granted, is to reside temporarily with his parents in Prestonburg, until such time as he can find an apartment or home of his own within the proposed station's primary service area (*Id.*).

21. Gibson also has pledged to discontinue any and all outside consulting services which would detract from his ability to effectuate his full-time integration commitment, upon the commencement of FM operations pursuant to program test authority (B&G Ex. 4, p. 2).

22. *Local Residence*. Except for the five-year period between 1975 and 1980, when he lived in Pikeville, Kentucky, Alan Burton has resided in Paintsville, or within the primary service area of B&G's proposed station, for his entire life (41 years) (B&G Ex. 5, p. 1). In 1981, Burton moved to his current residence at 9 Paradise Acres, in Hager Hill, Kentucky, within one-half mile of the home of his parents, and within the primary service area of B&G's proposed station (*Id.*). Burton plans to continue to reside at this address for the foreseeable future whether or not B&G is awarded a construction permit for its proposed station, and will maintain no residence other than his current Hager Hill residence (*Id.*).

23. William D. Gibson was born in Martin, and raised in McDowell, Kentucky, both of which are located in Floyd County, Kentucky, and each of which is within the primary service area of B&G's proposed FM station (B&G Ex. 6, 1). Gibson physically resided in Floyd County from the time of his birth, in 1946, through the end of 1965, at which time he joined the United States Navy (*Id.*). During his tenure with the Navy, Gibson's legal residence continued to be in Floyd County, until the beginning of 1969, when he married and briefly adopted Charleston, South Carolina, as his home (*Id.* p. 2). Following his honorable discharge from the Navy, in November, 1969, Gibson moved to Paintsville, Kentucky, where he remained a resident until the beginning of 1976 (*Id.*). Since that time, Gibson has lived outside the service area (*Id.*). He currently resides at 1400 Sequoia, in Plano, Texas (*Id.*). Gibson has pledged to move to a location within the service area of B&G's proposed station, in the event B&G's application is granted (*Id.*).

24. *Broadcast Experience*. Alan Burton's professional broadcast career began at the age of 16, with station WSIP in Paintsville, Kentucky, where he assisted with production and worked as an announcer, from 1966 to 1970 (B&G Ex. 5, p. 4). In 1970, Burton served as an announcer with station WDOC, at Prestonburg, Kentucky, and with WPRT, also located in Prestonburg, while attending school at Prestonburg Community College (*Id.*). In 1971, he returned to WSIP, where he remained until 1974, assisting with production and serving as a part-time announcer (*Id.*).

25. Burton began working with WDHR at Pikeville, Kentucky, in 1975, where he served as an announcer and assisted with production (*Id.*). In 1977, he was promoted to Program Director, and, in 1979, he became the station's general manager (*Id.*). He left WDHR in 1980 to pursue non-broadcast self-employment, but in 1983 he returned to broadcasting, with the formation of B&G, and the initiation of efforts to acquire WKLW (*Id.*). Since 1985, Burton has served as general manager of WKLW at Paintsville, as well as President, a Director and 50 percent shareholder of B&G, WKLW's licensee (*Id.*).

26. William D. Gibson began his professional broadcast career in 1963, as an announcer with WDOG, in Prestonburg, Kentucky, where he remained until 1965 (B&G Ex. 6, p. 3). In late 1965, Gibson entered the United States Navy as a communications technician, responsible for maintaining the electronic gyro-compass and shipboard navigation equipment on the U.S.S. Semmes, a guided missile destroyer (*Id.*). While aboard the U.S.S. Semmes, Gibson engineered and programmed closed-circuit radio broadcasts for the ship's crew, which included news, musical programming and entertainment (*Id.*).

27. Beginning in 1971, Gibson worked part-time as an announcer with WSIP at Paintsville, Kentucky, where he assisted with production as well (*Id.*). He remained with WSIP for an additional three to four years (*Id.*). In 1976, Gibson jointed WLSI at Pikeville, Kentucky, where he served as Sales Manager and Chief Engineer and performed some board duties, in addition to having an "on-air" show (*Id.*). He remained with WLSI until 1977, after which he worked and consulted with numerous broadcast stations (*Id.*). From 1977 to 1980, Gibson worked for WECL at Elkhorn City, Kentucky, serving as Assistant Manager, AM disc-jockey, and Assistant Chief Engineer (*Id.*). He remained with WLSI until 1977, after which he worked and consulted with numerous broadcast stations (*Id.*). From 1977 to 1980, Gibson worked for WECL at Elkhorn City, Kentucky, serving as Assistant Manager, AM disc-jockey, and Assistant Chief Engineer (*Id.*). He also worked as Assistant Chief Engineer and on-air talent with station WRIV, at Irvine, Kentucky, and assisted with the construction of WBPA, also located in Elkhorn City (*Id.* pp. 3-4). Additionally, he performed contract services for WDIC at Clincho, Virginia, assisting with the rebuilding of that station, as well as with efforts to increase the station's authorized power from 1000 to 5000 watts (*Id.* p. 4). In November, 1979, Gibson worked as Chief Engineer for WRAP at Norfolk, Virginia, and in May, 1980, the licensee of WRAP, Rawlings, Inc., transferred him to WCHS/WBES at Charleston, West Virginia, where he also served as Chief Engineer (*Id.*).

28. From 1980 to 1982, Gibson was Chief Engineer of WCHS at Charleston, West Virginia, and in 1982, he joined WIND, at Chicago, Illinois, as Chief Engineer, remaining through 1985 (*Id.*). In October, 1985, Gibson returned to Lexington, Kentucky, to do consulting work (*Id.*). Subsequently, near the end of January, 1986, he received an offer from Cox Communications of Atlanta, to work with stations WIOD and WAIA, at Miami, Florida, where he remained for 14 months, as Chief Engineer of those stations (*Id.*).

29. Since 1985, Mr. Gibson has served as Chief Engineer of station WKLW at Paintsville, as well as Secretary/Treasurer, a Director, and 50 percent shareholder of B&G, WKLW's licensee (*Id.*) Additionally, from February 1987 to January 1988, Gibson was a contract engineer for station WAQI at Goulds, Florida (*Id.*, p. 4).

30. *Civic Activities*. Alan Burton is and/or has been active in the following civic and professional organizations within the Paintsville community and the service area of B&G's proposed station: Our lady of the Mountains School Board; Paintsville Kiwanis Club where he has served as Board member since 1986 and president since 1990; Paintsville Lake Water Safety Council where he serves as chairman of the Water Safety Promotion Safety Promotion and Education Committee; and Paintsville Main Street Program where he served as director and also as chairman of the Promotional Committee.

31. *Daytimer Preference*. B&G claims a daytimer preference based upon its ownership and operation of standard, daytime-only broadcast station WKLW in Paintsville, Kentucky (B&G Ex. 3, p. 2). WKLW is authorized by the Federal Communications Commission to operate on an assigned frequency of 600 kHz, in Paintsville, at a nominal power of 5.0 kilowatts daytime, .5 kilowatts pre-sunrise, and 43 watts at night (*Id.* p. 1).[1] The FM channel at issue in MM Docket No. 90-433 is in the same community to which daytime-only station WKLW is licensed (*Id.* p. 2). B&G, the applicant in MM Docket No. 90-433, has owned and operated WKLW continuously for more than three years prior to the filing of its FM application herein -- B&G acquired WKLW in December, 1984, commenced operations in March, 1985, and has owned and operated WKLW continuously since that time (*Id.* pp. 1-2). B&G has pledged to divest WKLW within three years following the commencement date of FM operations, and B&G tendered this pledge to the Commission contemporaneously with the filing of its application in this proceeding, and prior to the expiration of 30 days following designation of B&G's FM application for hearing herein (*Id.* p. 2). Finally, Alan Burton, B&G's 50 percent shareholder, President and Director, has spent in excess of 20 hours per week participating in the management of WKLW during the three-year period preceding the filing of B&G's application in this proceeding, and B&G has proposed to integrate both Alan Burton and William D. Gibson, full-time, into the management of B&G's proposed FM station (*Id.*).

32. *Auxiliary Power*. B&G will install standby emergency power generation equipment at its studio and transmitter locations to keep Channel 234C3 on the air in the event of electrical failure (B&G Ex. 7, p. 1). The underlying purpose is to be able to provide a broadcast service, including information of an emergency nature, to the service area during times of inclement weather, disaster or power outages (*Id.*).

Ray Edmund Preston, II

33. Preston is a sole proprietorship with Ray Edmund Preston, II as the sole proprietor.[2]

34. Preston, and no member of his family, has any median interest (Preston, Ex. 1).

35. In the event of the award of the construction permit for the new station at Paintsville, Preston will be the General Manager of the station. As General Manager, he will control all aspects of the station, including but not limited to, programming, sales, employee hiring and firing, business, policy making and implementation and community relations. He will work 40 hours per week and what ever additional time is necessary, including days, nights, and weekends to make a successful station (Preston Ex. 1, p. 2).

36. In the event of the grant of his application, Preston will resign from any employment and all other employment at least 60 days prior to going on the air with the station to devote his occupation as being the General Manager of the station (Preston Ex. 1, p. 2).

37. Preston is, and has been for 44 years (his entire life), a resident of the area of the community of license. He has been a resident of Turner Branch, Kentucky, for the last 20 years. Turner Branch is just outside the city limits of Paintsville. His address within the community of license has been 123 Main Street, Paintsville, Kentucky 41240, both of which addresses are within the "city-grade" (3.16 mV/m) contour of his proposal (Preston Ex. 1, p. 1).

38. He is a graduate of Paintsville High School, and attended Prestonburg Community College and the University of Kentucky (*Ibid.*).

39. In 1968, he went into business with his father at The Community Market, one of the first and largest supermarkets in eastern Kentucky. He served as a full-time manager for two years supervising as many as eight employees. In 1973, he opened and managed his own bookstore until 1976 at which time he, with his father and brother, established Preston Coal Company, a surface mining operation. During the time of his involvement with the company (until 1981), he supervised as many as 10 employees (*Ibid.*).

40. Preston claims credit for civic activities. He was elected to three consecutive terms of the Commonwealth of Kentucky Legislature from 1985 - 1990. He was a Representative for the 97th District, serving the citizens of Paintsville. These projects have brought what is expected to be lasting jobs for the people of the area. While he was paid as a Representative, the pay actually detracted from his income production ability by causing him to spend significant time as a Representative rather than in gainful employment (Preston Ex. 1, pp. 2-3).

41. In 1970, he was elected as a member of the Johnson County (Paintsville) Fiscal court as Magistrate, and served until 1973 (Preston Ex. 1, 3). In about 1972, as the Johnson County Magistrate, he procured funds through a revenue sharing program to build and improve school facilities. This procurement of revenue sharing funds enabled Johnson County to forego spending local tax dollars for the needed building and improvement (Preston Ex. 1, p. 3).

42. He was a member of the Paintsville Jaycees for approximately a five years period from the late 1970's to the early 1980's. During that time, he was very active in helping raise money to support the youth of our community (Preston Ex. 1, p. 3).

43. From about 1970 until about 1983, he was involved as a coach and director of a youth baseball program in Paintsville (Preston Ex. 1, p. 3).

44. From 1989 until the present, he has been involved, as a founding participant, in "Project 2000." This is an organization of community business leaders working to create job opportunities for the people of Paintsville and the area (Preston Ex. 1, p. 4).

45. In either 1962 or 1964, he became a Kentucky Colonel. The commission as a Kentucky Colonel is a lifetime appointment. This was awarded to him based on his service to the community (Preston Ex. 1, p. 4). In about 1986, he received the Kentucky Admiral award for this participation in the cleanliness of Kentucky waterways. This participation took place in Paintsville (Preston Ex. 1, p. 4).

46. In 1990, he received a Certificate of Appreciation from the Joint Executive Council of the Commonwealth of Kentucky Veterans Organization) In 1989, he received a certificate for outstanding achievements to the Arts in the Commonwealth of Kentucky from Arts Vision, Unlimited. This is a non-profit organization promoting arts in Kentucky, and his participation for which he received the certificate was in Paintsville (Preston Ex. 1, p. 4).

47. In the early 1970's, he was one of a two person committee who helped bring a professional baseball franchise to Paintsville (Preston Ex. 1, p. 4).

48. Preston claims credit for his past broadcast experience. He worked for about four years (from 1981 to 1985) for WSIP AM/FM in Paintsville. During that time he was, in part, the News Director, and performed those duties required of a News Director at a broadcast facility. Additionally, he has worked periodically and part time for WSIP from 1962 to 1976, and has performed services relating to news and information, sports and community events (Preston ex. 1, p. 2).

49. He has also worked periodically and part-time for WKLW-AM in Paintsville. He performed on-air services relating to news and information, sports and community events, beginning in August, 1989, and my last on-air date was in late, 1989 (Preston Ex. 1, p. 2).

50. Preston claims credit for his auxiliary power proposal (Preston Ex. 1, p. 5).

Comparative Coverage

51. The applicants in this proceeding have submitted a joint engineering exhibit which sets forth the areas and population which will be served by each applicant (Tr. 8-9). The population was based on the 1980 U.S. Census and the land area was determined by polar planimeter from an appropriate map scale factor (Joint Engineering Ex. p. 2). The figures are as follows:

Applicant	Area (sq. km.)	Population
B&G	4,985	116,391
Preston	4,680	126,501
Sellers	4,938	114,032

(Joint Engineering Ex., Figures 3A, 3B, 3C).

52. The exhibit further demonstrates that during the daylight hours, none of the applicants will provide service to any underserved areas; in the daytime, all non-common areas receive at least five other aural services (Joint Engineering Ex. p. 2). During the hours of darkness, there are three small non-common areas that receive only four other services at night (*Id.*). Each applicant proposes to serve portions of those areas (*Id.*). B&G's proposal would serve 827 persons receiving only four other other services at night, within an area of 65 square kilometers (*Id.*, Figure 3A). Preston's proposal would serve 293 persons receiving only four other nighttime services, within an area of 16 square kilometers (*Id.*, Figure 3B). Finally, Sellers' proposal would serve 935 persons receiving only four other nighttime services, within an area of 93 square kilometers (*Id.*, Figure 3C).

Conclusions of Law

Diversification

53. Neither Sellers nor Preston have attributable interests in any media of mass communications. B&G is the licensee of WKLW(AM) at Paintsville, Kentucky, and Burton and Gibson constitute the shareholders, officers and directors of B&G. However, neither B&G's nor its principals' interests in WKLW are attributable to B&G under the diversification criterion in this proceeding. B&G claims a daytimer preference herein based upon its operation of WKLW, and the applicant has pledged to divest itself of any and all interests in WKLW within three years from the commencement of station operations pursuant to program test authority. Additionally, Burton and Gibson each have pledged to divest themselves of all interests in WKLW within three years of commencement of station operations under program test authority. Each of these divestiture commitments were set forth by B&G contemporaneously with the filing of its application in this proceeding, and prior to the expiration of 30 days following designation of B&G's FM application for hearing herein. Thus, pursuant to the policies set forth by the Commission in *Implementation of BC Docket No. 80 - 90 to Increase the Availability of FM Broadcast Assignments, Second Report and Order*, 101 FCC 2d 638, §§ 22-24, n. 15 (1985) (*Second Report Order*), no diversification demerit may be assessed against B&G or its principals for their interest in the daytime-only station. Neither B&G, nor its principals hold any interest in any medium of mass communications other than WKLW(AM). Accordingly, all of the applicants are equal under the diversification criterion and no applicant is deserving of a preference of demerit.

Best Practicable Service

54. *Gary Sellers*. Mr. Sellers is entitled to 100 percent integration credit for his management participation proposal. As the sole proprietor of his proposed station, Mr. Sellers will work full time, no less than 40 hours per week, at his station as its general manager. As general manager of the station he will personally oversee all areas of the station's operation, including business, programming, news, and public affairs. Mr. Sellers' current ownership of The Mens Shop will pose no bar to the effectuation of his integration proposal. He will sell that business prior to the initiation of program tests, thus, nothing will prevent him from devoting his full time and attention to the radio station.

55. Mr. Sellers' proposal is substantially enhanced by his long-term local residence and by his proposal to continue to reside in Paintsville. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395-96 (1965).

56. The Sellers' Exhibit 2 shows that Sellers was involved in civic activities in his residence area, but his claim for enhancement credit for this must be disallowed. Sellers has failed to claim such enhancement credit timely. Although Sellers submitted his integration statement with his application, he did not allude therein to his civic activities. The instructions to Section IV-B advise applicants that in FM proceedings integration statements and claims for qualitative credit must be filed by the amendment as-of-right date, and should the applicant fail to disclose its integration claims no credit will be given. *See also* Commission's *Memorandum Opinion and Order* in *Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301*, 4 FCC Rcd 3853, 3853 at n. 77. The Commission released its Notice of Tenderability with respect to Sellers' application on March 20, 1990). Accordingly, the last date on which Sellers would have been entitled to advance or amend his integration proposal in this proceeding was April 19, 1990. However, Sellers did not advance his claim for civic activities until January 3, 1991, almost nine months beyond the date allowed by the Commission. No action was taken on Sellers' January 3, 1991 Submission of Supplement to Integration and Diversification Statement. At hearing Sellers resubmitted his claim for civic activities in his Exhibit 2. Exhibit 2 was received subject to strike at the time of the Initial Decision herein. In its Proposed Findings and Reply Findings, Sellers argues that local residence and civic activities are not treated as separate enhancement factors and because civic activities merely enhance local residence credit, a claim to the overriding and prerequisite local residence is sufficient. Sellers' argument must be rejected. The instructions to Section IV-B of Form 301 regarding qualitative credits are clear as is the reference to them in the Commission's *Memorandum Opinion and Order* in *Revision of Form 301 (supra)*. To accept Sellers' claim for an enhancement credit for civic activities would amount to an impermissible upgrading of his application. Sellers' Exhibit 2 IS STRICKEN from the record.

57. Sellers' proposal is enhanced slightly by the proposed use of auxiliary power equipment at both studio and transmitter sites.

58. *B&G*. B&G is entitled to 100 percent quantitative integration credit for the integration proposals of Alan Burton and William D. Gibson. Each will serve in a full time managerial capacity at B&G's proposed station. Nothing in the record undermines either of their commitments, or their abilities to effectuate them.

59. B&G's quantitative integration is enhanced substantially by Burton's 50 percent full local residence credit and Gibson's 50 percent 23 year service area, 6 year local, and proposed future service area residence. B&G's local and service area residence credit is further enhanced moderately by Burton's involvement in civic activities within the community of license.

60. B&G's proposal also is enhanced substantially by extensive past broadcast experience of each of its principals. Moreover, B&G has met each one of the Commission's requirements for the daytimer preference claimed by the applicant. *See generally, Second Report Order*, 101 FCC 2d 638 (1985). [3] Accordingly, pursuant to the policies of the Commission, B&G's past broadcast experience is upgraded so as to be equal to the enhancement value of local residence or minority ownership.

61. B&G's proposal also is enhanced by its proposed use of auxiliary power equipment at both studio and transmitter sites.

62. *Ray Edmund Preston*. The competing applicants would have Preston denied any integration credit. They maintain that Preston's proposal to integrate should not be ascribed any weight because they perceive him to be an inveterate liar. They point to three instances where Preston's truthfulness came into question. (1) In his Exhibit I, Preston averred that he was presently a self-employed leasing agent for oil and gas drilling and exploration; but at hearing testified that this statement was not true as of the date it was made. (2) Preston certified site availability upon assurances of his grandmother; but the letter of assurance was signed by his mother and he was generally confused as to the site's ownership, both at the deposition and at hearing. (3) In his Exhibit I, Preston averred that he was presently an employee of WKLW(AM), but gave conflicting statements both at deposition and at hearing.

63. The record does not support the competing applicants' charges. (1) Self-employment. The fact that Preston began to work for Consolidated Health Systems about the time he signed his declaration on June 10, 1991, does not prove that he was no longer in the oil and gas drilling and exploration business. (2) Preston may have been confused as to whether his mother or grandmother owned his proposed transmitter site, but there is no reason for him to have lied. There is no site availability issue and no question that he has assurance of site availability. (3) Employment at WKLW was never expressly terminated. Preston worked there on an *ad hoc* basis. Preston claims, and the record seems to bear him out that he was still owed some money for services rendered. Preston has not claimed credit for broadcast experience for any time that he was not broadcasting.

64. Preston's proposal to work full time, at least 40 hours per week as General Manager of the station will be fully credited. He pledged to resign his current activities, and there is no impediment to his being able to perform his responsibilities as General Manager. Therefore, Preston is entitled to 100 percent integration credit. *Berryville Broadcasting Co.*, 70 FCC 2d 1 (Rev. Bd. 1978).

65. Preston's proposal is substantially enhanced by his life-term service area residence, and his long-term community residence. Additionally, Preston has shown a deep involvement in the community shows he has significant knowledge of the needs and wants of the public. Thus, Preston's proposal is substantially enhanced by his civic activities. *Policy Statement on Comparative Broadcast Hearing*, 1 FCC 2d 393 (1965).

66. Preston's proposal is also enhanced slightly by his past broadcast experience and by his proposal to employ auxiliary power at both the studio site and transmitter site in the event of interruption of electrical service.

Comparative Coverage

67. The evidence of record indicates that the areas and populations within the applicants' proposed service areas are well served. During the day, no applicant will provide a new fifth service. With respect to nighttime service, Preston will bring a fifth service to 293 persons; B&G will bring a fifth service to 827 persons, and Sellers to 935 persons. These respective numbers constitute but .3 percent, .8 percent and .9 percent increases, respectively, in population served with a fifth signal at night. This is *de*

minimis. As to the differences in total population served, no one other than those persons numbered above receive less than five services already. Accordingly, none of the applicants is entitled to a preference for comparative coverage. *Simon Geller*, 90 FCC 2d 250, 276 (1982).

Ultimate Comparative Evaluation

68. Sellers is entitled to 100 percent integration credit which is enhanced substantially by his local residence (100 percent) and his proposal to install auxiliary power. He receives no credit for civic involvement because credit was not timely claimed.

69. B&G is entitled to 100 percent integration credit, which is enhanced substantially by 50 percent past local residence and 50 percent service area residence; 50 percent civic involvement (moderately); 100 percent substantial broadcast experience and which because, B&G is credited with daytimer preference, is equivalent to local residence (substantial); and its proposal to install auxiliary power.

70. Preston is entitled to 100 percent integration credit which is enhanced by local area residence and civic involvement (substantially); broadcast experience (slightly) and his proposal to install auxiliary power.

71. From the foregoing analysis it is clear that B&G is the winner. All three applicants are quantitatively equal, but qualitatively B&G has received the most enhancement credits.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the decision on its own motion in accordance with Section 1.276 of the Rules, the application of B&G Broadcasting, Inc. (File No. BPH-891220MH) IS GRANTED, and the applications of Gary Sellers (File No. BPH-891215ML) and Ray Edmund Preston (File No. BPH-891220MI) ARE DENIED.[4]

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

FOOTNOTES

[1] WKLW never has exceeded the power permitted by B&G's post-sunset authorization (Tr. 100, 87).

[2] *See* application of Ray Edmund Preston, II.

[3] *Daytimer Preference*. The Commission has set down the following conditions which an applicant such as B&G herein has to meet before it can be awarded a daytimer preference:

(i) The FM allotment applied for must be in the same community as the daytime-only station;

(ii) The applicant must have owned the daytime-only facility for three continuous years prior to the filing of its FM application;

(iii) The daytime-only applicant must pledge to divest the AM facility within three years after the commencement date of FM operations. This pledge is required to be made within 30 days after designation of the FM application for hearing;

(iv) Members of the applicant entity holding cognizable ownership interests must have spent more than 20 hours per week (either individually on or in the aggregate) participating in the management of the daytime-only facility during the three year period prior to filing the FM application; and

(v) The applicant must propose to be integrated in the operation of the FM station.

See Second Report and Order, 101 FCC 2d 638 at 644, 646-47, 57 RR 2d 1607 at 1611-13 (1985), *recon. denied and decision clarified*, 61 RR 2d 1704 (1987), aff'd 822 F.2d 277 (2nd Cir. 1988).

4 In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Seawest Yacht Brokers dba
San Juan Marina
Friday Harbor, Washington

Operation of an unlicensed
Coast Station in the
Maritime Mobile Radio Service

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 17, 1992; Released: April 21, 1992

By the Commission:

1. On August 2, 1991, at 11:06 AM PST, an employee of the Commission's Ferndale, Washington, monitoring facility intercepted transmissions on marine channel 68 (156.425 MHz) from a coast station identified as "San Juan Marina". A check of Commission files failed to disclose any record of a coast station license for the San Juan Marina.

2. At 11:34 AM on the same date, the Commission employee spoke with Mr. Dieter Hertling, an employee of San Juan Marina. Mr. Hertling stated that his station call sign was WAP7907. It was pointed out to him that this was the call sign for the company's boat and was not valid for use on land and did not cover the radio installed in their store. He was advised that the radio in the store was unlicensed and should not be used.

3. Section 301 of the Communications Act provides in relevant part:

> No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

Similarly, Section 80.13(a) of the Commission's Rules states:

> All stations in the maritime services must be licensed by the FCC.

Consequently, it is determined that an apparent violation of Section 301 of the Communications Act and Section 80.13(a) of the Commission's Rules has occurred for operating a coast radio station without an authorization.

4. Section 503(b) of the Communications Act states in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have---
>
> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter . . . shall be liable to the United States for a forfeiture penalty.

5. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*, the base forfeiture amount for operation of a radio station without authorization for the service is $8,000.

6. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Sec 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. §1.80, IT IS ORDERED that Seawest Yacht Brokers, dba San Juan Marina IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Eight Thousand Dollars ($8,000) for the willful violation of the aforementioned statutory and rule provisions on August 2, 1991. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80(f)(3), that Seawest Yacht Brokers, dba San Juan Marina shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed.

8. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

If you wish to file a written response regarding why the forfeiture should be reduced or not be imposed, please send it to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

9. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to Seawest Yacht Brokers dba San Juan Marina, P.O. Box 340, 2nd Spring Street West, Friday Harbor, Washington 98250.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Maryann McCarty,
Hammond, Oregon

Operation of an Unlicensed
Coast Station in the
Maritime Mobile Radio Service

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 17, 1992; Released: April 21, 1992

By the Commission:

1. On August 1, 1991, at 7:01 AM PST, an employee of the Commission's Ferndale, Washington, monitoring facility intercepted transmissions on marine channel 11, 156.550 MHz. A male operator on the vessel KING FISHER called for Maryann. A female operator responded, "Go ahead, Jack." The transmissions were otherwise unidentified. The Commission determined that vessel KING FISHER was registered to Jack R. McCarty, Hammond, Oregon.

2. At 7:18 AM PST, the Commission employee telephoned the McCarty residence and spoke with a woman who identified herself as Maryann. She also admitted having made the monitored transmissions. She admitted that she did not have a license for the station she was operating, but claimed to have applied for one. She confirmed that her address was Maryann McCarty, 279 Mariner, P.O. Box 5, Hammond, Oregon 97121.

3. Section 301 of the Communications Act provides in relevant part:

> No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

Similarly, Section 80.13(a) of the Commission's Rules states:

> All stations in the maritime services must be licensed by the FCC.

4. Section 503(b) of the Communications Act states in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have---
>
> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter . . . shall be liable to the United States for a forfeiture penalty.

Consequently, it is determined that an apparent violation of Section 301 of the Communications Act and Section 80.13(a) of the Commission's rules has occurred for operation of the coast station without a proper station authorization.

5. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Sec 503(b) and Section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, IT IS ORDERED that Ms. Maryann McCarty IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Eight Thousand Dollars ($8,000) for the willful violation of the aforementioned statutory and rule provisions on August 1, 1991. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

6. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80(f)(3), that Maryann McCarty shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed.

7. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

If you wish to file a written response regarding why the forfeiture should be reduced or not be imposed, please send it to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to Maryann McCarty, 279 Mariner, P.O. Box 5, Hammond, Oregon 97121.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Aberdeen Florist, Inc.

Notice of Apparent Liability
for Forfeiture Penalty for
Station WNAE764 in
the Private Land Mobile Radio
Service at Churchville, MD

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 17, 1992; Released: April 21, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against Aberdeen Florist, Inc., Aberdeen, Maryland, a licensee in the Commission's Private Land Mobile Radio Service, call sign WNAE764. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Sec. 17.23 and 17.50), the lighting of radio antenna towers (47 C.F.R. Sec. 17.26) and notification to the FAA if tower lights malfunction (47 C.F.R. Sec. 17.48(a)). *See also* 47 C.F.R. Sec. 17.47(a)(1).

2. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29, on September 9 and 10, 1991. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Sec. 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Sec. 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Sec. 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sec. 17.23 and 17.50. Aberdeen Florist, Inc., therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing FAA notification regarding malfunctioning lights and the painting of towers.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *Deregulation - Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934, 47 USC Section 503(b). Pursuant to our *Policy Statement, Standards for Assessing Forfeiture*, 6 FCC Rcd 4695 (1991), *recon. pending*, the base amount of a monetary forfeiture penalty for failure by a Private Land Mobile licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that Aberdeen Florist, Inc., IS APPARENTLY LIABLE FOR A FORFEITURE of Eight Thousand Dollars ($8,000) for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Aberdeen Florist, Inc., shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Any written response regarding why the forfeiture should be reduced or be imposed should be sent to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to Aberdeen Florist, Inc., Post Office Box 97, S. Bush Chapel Road, Aberdeen, Maryland 21001.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Magness Plumbing & Heating, Inc.

Notice of Apparent Liability
for Forfeiture Penalty for
Station WNWV645 in
the Private Land Mobile Radio
Service at Churchville, MD

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 17, 1992; Released: April 21, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against Magness Plumbing & Heating, Inc., Bel Air, Maryland, a licensee in the Commission's Private Land Mobile Radio Service, call sign WNWV645. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Sec. 17.23 and 17.50), the lighting of radio antenna towers (47 C.F.R. Sec. 17.26) and notification to the FAA if tower lights malfunction (47 C.F.R. Sec. 17.48(a)). *See also* 47 C.F.R. Sec. 17.47(a)(1).

2. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29, on September 9 and 10, 1991. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Sec. 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Sec. 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Sec. 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sec. 17.23 and 17.50. Magness Plumbing & Heating, Inc., therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing FAA notification regarding malfunctioning lights and the painting of towers.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *Deregulation - Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934, 47 USC Section 503(b). Pursuant to our *Policy Statement, Standards for Assessing Forfeiture*, 6 FCC Rcd 4695 (1991), *recon. pending*, the base amount of a monetary forfeiture penalty for failure by a Private Land Mobile licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that Magness Plumbing & Heating, Inc. IS APPARENTLY LIABLE FOR A FORFEITURE of Eight Thousand Dollars ($8,000) for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Magness Plumbing & Heating, Inc. shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Any written response regarding why the forfeiture should be reduced or not imposed should be sent to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to Magness Plumbing & Heating, Inc., 1502 S. Tollgate Road, Bel Air, Maryland 21014.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Paul's Utility Co.

Notice of Apparent Liability
for Forfeiture Penalty for
Station KVL720 in
the Private Land Mobile Radio
Service at Churchville, MD

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 17, 1992; Released: April 21, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against Paul's Utility Co., Forest Hill, Maryland, a licensee in the Commission's Private Land Mobile Radio Service, call sign KVL720. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Sec. 17.23 and 17.50), the lighting of radio antenna towers (47 C.F.R. Sec. 17.26) and notification to the FAA if tower lights malfunction (47 C.F.R. Sec. 17.48(a)). *See also* 47 C.F.R. Sec. 17.47(a)(1).

2. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29, on September 9 and 10, 1991. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Sec. 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Sec. 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Sec. 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sec. 17.23 and 17.50. Paul's Utility Co., therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing FAA notification regarding malfunctioning lights and the painting of towers.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *Deregulation - Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934, 47 USC Section 503(b). Pursuant to our *Policy Statement, Standards for Assessing Forfeiture*, 6 FCC Rcd 4695 (1991), *recon. pending*, the base amount of a monetary forfeiture penalty for failure by a Private Land Mobile licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that Paul's Utility Co. IS APPARENTLY LIABLE FOR A FORFEITURE of Eight Thousand Dollars ($8,000) for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Paul's Utility Co. shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Any written response regarding why the forfeiture should be reduced or not imposed should be sent to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to Paul's Utility Co., 500 Bynum Road, Forest Hill, Maryland 21050.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Mid Atlantic Installation
Services, Inc.

Notice of Apparent Liability
for Forfeiture Penalty for
Station WNVP816 in
the Private Land Mobile Radio
Services at Churchville, MD

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 17, 1992; Released: April 21, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against Mid Atlantic Installation Services, Inc., Aberdeen, Maryland, a licensee in the Commission's Private Land Mobile Radio Services, call sign WNVP816. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Sec. 17.23 and 17.50), the lighting of radio antenna towers (47 C.F.R. Sec. 17.26) and notification to the FAA if tower lights malfunction (47 C.F.R. Sec. 17.48(a)). *See also* 47 C.F.R. Sec. 17.47(a)(1).

2. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29, on September 9 and 10, 1991. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Sec. 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Sec. 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Sec. 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sec. 17.23 and 17.50. Mid Atlantic Installation Services, Inc., therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing FAA notification regarding malfunctioning lights and the painting of towers.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *Deregulation - Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934, 47 USC Section 503(b). Pursuant to our *Policy Statement, Standards for Assessing Forfeiture*, 6 FCC Rcd 4695 (1991), *recon. pending*, the base amount of a monetary forfeiture penalty for failure by a Private Land Mobile licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that Mid Atlantic Installation Services, Inc. IS APPARENTLY LIABLE FOR A FORFEITURE of Eight Thousand Dollars ($8,000) for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Mid Atlantic Installation Services, Inc. shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Any written response regarding why the forfeiture should be reduced or not imposed should be sent to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to Mid Atlantic Installation Services, Inc., 11 N. Park Street, Aberdeen, Maryland 21001.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CompUSA, Inc.
Dallas, Texas

NOTICE OF APPARENT LIABILITY

Adopted: March 17, 1992; Released: April 21, 1992

By the Commission:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), to CompUSA, Inc., formerly Soft Warehouse, for willful violation of Section 302(b) of the Communications Act, 47 U.S.C. §302(b), and of Section 2.803 of the Commission's Rules, 47 C.F.R. § 2.803. On May 22, 1991, at its store near Atlanta, Georgia, CompUSA offered for sale an unnamed printer card and a light pen and parallel printer card, each of which are Class B personal computer peripheral devices. Equipment authorizations had not been granted for either device. See 47 C.F.R. §§ 15.3(r) and 15.101(a).

2. The appropriate amount of forfeiture for these violations is $20,000.

II. BACKGROUND

3. CompUSA is a nationwide chain of retail stores selling personal computer software and hardware. Personal computers are defined to be Class B digital devices under Part 15 of the Commission's Rules. Both personal computers and their peripheral devices must receive Commission certification before they may be offered for sale. 47 C.F.R. §§ 2.803 & 15.101(a).

4. On May 22, 1991, an employee of the Commission's Field Operations Bureau (FOB) visited the CompUSA store near Atlanta, Georgia, in the same manner as members of the general public. He found offered for sale an unnamed printer card, CompUSA stock number 732301, and a light pen and parallel printer card, CompUSA stock number 757112. There was no evidence that an equipment authorization had been granted for either of these cards.

5. Previously, on January 19, 1990, and on November 16, 1990, the FOB had assessed a monetary forfeitures of $2,000 each to CompUSA, then operating under the name Soft Warehouse, for marketing uncertified personal computers. The forfeitures were paid on April 4, 1990, and January 29, 1991, respectively.

III. DISCUSSION

6. CompUSA has clearly violated Section 302(b) of the Communications Act and Section 2.803 of the Rules with respect to each of two personal computer peripheral devices.

7. The violations are willful. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Record 4695 (1991), *recon. pending*, the base forfeiture amount for marketing unauthorized equipment is $7,000.

8. Due to the company's history of violations, and the fact that the violation was repeated with two different pieces of equipment, consistent with the *Policy Statement* we are increasing the forfeiture amount to $20,000. No other adjustments appear warranted.

9. The marketing of each device constitutes a separate violation.

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47C.F.R. §1.80, that CompUSA, Inc., IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of $20,000 for marketing uncertified personal computer peripheral devices in violation of Section 302(b) of the Communications Act and Section 2.803 of the Commission's Rules. The amount specified was determined after consideration of the factors set forth in Section 503(b) of the Communications Act.

11. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47C.F.R. § 1.80(f)(3), that CompUSA, Inc., shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

Send written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: NAL response
Room 744
1919 M Street, NW
Washington, D.C. 20554

12. IT IS FURTHER ORDERED that the Secretary shall send by registered mail a copy of this Notice of Apparent Liability for Monetary Forfeiture to CompUSA, Inc., 15160 Marsh Lane, Dallas, Texas 75234.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liuski International, Inc.
Melville, New York

NOTICE OF APPARENT LIABILITY

Adopted: March 20, 1992; Released: April 24, 1992

By the Commission:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, (the Act), 47 U.S.C § 503(b), to Liuski International, Inc. (Liuski) for willful and repeated violations of Section 302(b) of the Communications Act, 47 U.S.C. § 302(b), and Section 2.803 of the Commission's Rules, 47 C.F.R. §2.803. On May 21 and 23, 1991, at the Spring '91 COMDEX trade show in Atlanta, Georgia, Liuski offered for sale a Magitronic 286-16 personal computer, Class B digital device for which no equipment authorization had been granted. *See* 47 C.F.R. §§ 15.3(i) & (s), 15.101(a). The device was improperly proffered as a Class A digital device. *See* 47 C.F.R. § 15.3(s).

2. The appropriate amount of forfeiture for this violation is $20,000.

II. BACKGROUND

3. Liuski is a manufacturer of personal computers. These are defined to be Class B digital devices under Part 15 of the Commission's Rules and, as such, are subject to the equipment authorization requirements and marketing restrictions. Specifically, they must be certified by the Commission before they may be offered for sale. Offer for sale includes display and demonstration.

4. On May 20, 1991, an employee of the Commission's Field Operations Bureau (FOB) visited the Liuski booth at the Spring '91 COMDEX show in Atlanta, Georgia, in the same manner as usual visitors, identified himself as an FCC employee, and observed on display a Magitronic 286-16 personal computer which was not certified by the Commission. It was incorrectly labelled as a Class A digital device. Mr. Todd Bennett, the Liuski Sales Manager, was advised that the device was improperly classified and needed to be certified.

5. On May 23, 1991, a different employee of the FOB again visited the Liuski booth at the COMDEX show, without identifying himself, and again observed the Magitronic 286-16 personal computer on display. He discussed the price with Mr. Todd Bennett, the Liuski Sales Manager.

6. Liuski is a major manufacturer and distributor of Class B digital computing devices to both its company owned retail stores and independent retailers. In response to prior forfeiture notices it has repeatedly stated that it understands the marketing rules and will not violate them again.

7. This does not appear to be the first time Liuski has violated these rules. Previously, on June 27, 1988, the FOB had assessed a monetary forfeiture of $2,000 to Liuski. The forfeiture was for having displayed a Samsung XT computer on May 10, 1988, at the Spring '88 COMDEX show without the required conspicuous statement concerning the fact that it had not been certified by the Commission.

8. On October 24, 1991, the FOB assessed a monetary forfeiture of $2,000 to Liuski. (The NAL was issued December 11, 1990.) The forfeiture was for having displayed a Vexcel VXL6100SX notebook personal computer on November 12, 1990, at the Fall '90 COMDEX show without the required conspicuous statement concerning the fact that it had not been certified by the Commission.

III. DISCUSSION

9. Liuski has clearly violated Section 302(b) of the Communications Act and Section 2.803 of the Rules.

10. The violations on May 21 and 23, 1991, are each willful. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Record 4695 (1991), *recon. pending*, the base forfeiture amount would be $7,000 for marketing unauthorized equipment.

11. Due to Luiski's apparent history of violations, the fact that the violation was repeated on a second day, and the fact that classifying a Class B device as a Class A device is an egregious violation, consistent with the *Policy Statement* we are adjusting the forfeiture amount upward to $20,000. No other adjustments appear warranted.

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that Liuski International, Inc., IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of $20,000 for marketing uncertified personal computers in violation of Section 302(b) of the Communications Act and Section 2.803 of the Commission's Rules. The amount specified was determined after consideration of the factors set forth in Section 503(b) of the Communications Act.

13. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47C.F.R. § 1.80(f)(3), that Liuski International, Inc., shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Any written response must include a detailed factual statement and supporting documentation. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

Send written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: NAL response
Room 744
1919 M Street, NW
Washington, D.C. 20554

14. IT IS FURTHER ORDERED that the Secretary shall send by registered mail a copy of this Notice of Apparent Liability to Monetary Forfeiture to Liuski International, Inc., 7025-E Amwiler Industrial Drive, Atlanta, Georgia 30360.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-8

In re Applications of	
EVE ACKERMAN	File No. BPH-871123MA
Wayne G. Fields and Geraldine Y. Miller d/b/a L.L. BROADCASTING	File No. BPH-871124ME
ALACHUA BROADCASTERS, INC.	File No. BPH-871124MN
Brent L. Harmon and Elvin L. Harmon d/b/a HARMON BROADCAST PARTNERS	File No. BPH-871124MQ

For Construction Permit for
New FM Station on Channel 223A,
Alachua, Florida

Appearances

Dennis J. Kelly, Esq., on behalf of Eve Ackerman; *Lawrence M. Miller, Esq.*, and *Carol I. Broadbent, Esq.*, on behalf of L.L. Broadcasting; and *James A. Koerner, Esq.*, on behalf of Harmon Broadcast Partners.

DECISION

Adopted: April 1, 1992; Released: April 21, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

Board Member GREENE:

1. Before the Review Board is the *Initial Decision* of Administrative Law Judge Joseph P. Gonzalez (ALJ), 6 FCC Rcd 5277 (1991), which granted the construction permit application of Eve Ackerman for a new FM station in Alachua, Florida, and denied the competing applications of L.L. Broadcasting and Harmon Broadcast Partners. L.L. Broadcasting and Harmon have filed exceptions to this decision, and Ackerman has filed contingent exceptions.[1] All three have filed replies.[2]

2. The *Hearing Designation Order*, 5 FCC Rcd 800 (Mass Media Bur. 1990), released in this proceeding designated the applicants before us for hearing on the "standard comparative" issue, which is governed primarily by the guidelines set forth in the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (*Policy Statement*).[3] After hearing evidence, the ALJ concluded that neither L.L. Broadcasting nor Harmon is entitled to full credit for its integration proposal. Each is a partnership consisting of a parent and child, and in each case the ALJ disallowed integration credit for the parent's proposed participation. The ALJ found that Ackerman is entitled to full credit for her integration proposal and granted her application. Both L.L. Broadcasting and Harmon except to the ALJ's integration finding, each arguing that it received too little credit and Ackerman received too much. The parties also argue that various basic qualifications issues should have been added against each other. After a review of the exceptions and record, and for the reasons set forth below, we conclude that L.L. Broadcasting's integration proposal should have been fully credited and that grant of its application would best serve the public interest.

L.L. BROADCASTING

3. L.L. Broadcasting is a general partnership whose partners are Wayne G. Fields (75 percent interest) and his mother, Geraldine Miller (25 percent interest). *Initial Decision* at 5279 ¶24. Both propose to be integrated on a full time basis, with Fields working no less than forty hours a week as General Manager and Miller working no less than forty hours a week as Director of News and Public Affairs. *Id.* at ¶¶26, 29. The ALJ did not credit Mrs. Miller here because he found that she left the preparation of the application to her son and intends to defer to his judgment in the future. He further said, "These candid admissions, when viewed in the light of her lack of gainful employment since 1981, makes it highly unlikely that Mrs. Miller will assume a full-time management position at the station." *Id* at 5280 ¶36. Thus, the ALJ concluded that L.L. Broadcasting could be given quantitative integration credit only for the seventy-five percent interest held by Fields.

4. We agree with L.L. Broadcasting that this ruling is erroneous and that L.L. Broadcasting should also be given credit for Mrs. Miller's twenty-five percent interest. An applicant bears the burden of convincing the Commission that its integration proposal is reliable, a burden Mrs. Miller has met here. *See Cuban-American Limited*, 5 FCC Rcd 3781, 3785 ¶28 (1990) (subsequent history omitted). She was unequivocal about her commitment to work full

[1] The application of Alachua Broadcasters, Inc., was denied for failure to demonstrate its financial qualifications. Because it has not filed exceptions to this denial, the Motion to Dismiss filed by Eve Ackerman will be granted, and Alachua Broadcasters, Inc., will be dismissed for failure to prosecute.

[2] The requests for oral argument filed by Eve Ackerman on October 23, 1991, and Wayne G. Fields and Geraldine Y. Miller, d/b/a L.L. Broadcasting on October 28, 1991, will be denied. The issues presented in the instant proceeding are neither extraordinary nor complex. The Board foregoes oral argument where argument would not lend valuable assistance in resolving the issues before it. *See Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 163 (1990).

[3] *Cf. Bechtel v. FCC*, No. 91-1112 (D.C. Cir. Jan. 31, 1992) (remanded to consider the continuing validity of integration criterion in comparative cases); News Release, DC-2072, GC Docket No. 92-52, released March 12, 1992 (announcing reexamination of the *Policy Statement*). None of the applicants has challenged the appropriateness of the *Policy Statement*'s criteria in this proceeding.

time at the station in her role as Director of News and Public Affairs. *See* L.L. Ex. 2, p. 1; Tr. 101. She has no other business interests that would raise questions about her ability to effectuate this proposal, and she has no serious health problems. Tr. 87. But, she also was candid about deferring to her son in making the partnership's business decisions (Tr. 90) because of his role as general manager and majority owner and his superior experience. This deference caused the ALJ erroneously to conclude that she would not likely assume a full-time management role. *Initial Decision* at 5280 ¶36.

5. The test here is whether Mrs. Miller's proposed role meets the criteria for receiving credit in the Commission's *Policy Statement*. There the Commission said it would "look to the positions which the participating owners will occupy, in order to determine the extent of their policy functions and the likelihood of their playing important roles in management." 1 FCC 2d at 395. It further said, "We will accord particular weight to staff positions held by owners, such as... director of news... or public service broadcasting," *id*, the specific role Mrs. Miller and her son agreed on together, Tr. 85, in light of her twenty-five percent interest. Tr. 77.[4] *See National Communications Industries*, 7 FCC Rcd _____, slip op. at 3 n.3 (FCC 92-77, released Feb. 28, 1992) (credit given to Director of Public Affairs and Public Service). Nothing in the record suggests that she will not have this position and its accompanying responsibilities. *See MTF Enterprises*, 99 FCC 2d 297, 299, 300 ¶6 (Rev. Bd. 1984) (proposed role not rebutted) (subsequent history omitted). She does not have to be in control of the applicant to receive this credit, so the fact that she expects generally to be deferential to her son and partner in making decisions with respect to the partnership's business dealings does not diminish the integration credit that should flow from her full-time commitment to *her* role.[5] *See National Communications Industries, supra*, ("Nor will we discredit that proposal because [the proposed Director of Public Affairs and Public Service] played a less significant role in prosecuting Orion's application than did the other two stockholders); *McClenahan Broadcasting, Inc.*, 5 FCC Rcd 7269, 7272 ¶ 14 (Rev. Bd. 1990) ("there is no prohibition against the majority principal leading the way in prosecuting the application, providing the other active principals play true and active roles in management") (subsequent history omitted);[6] *Vela Broadcasting Co.*, 2 FCC Rcd 3663, 3667 ¶19 (Rev. Bd. 1987) (dominance of majority stockholder does not preclude credit for others who play true and actual roles in management). Thus, this case differs from cases where the Commission has found principals so out of touch with their claimed roles that it has denied integration credit. *See, e.g., Cuban-American Limited*, 5 FCC Rcd at 3786 n.4 (directors had no knowledge of the applicant's affairs); *Coastal Broadcasting Partners*, 6 FCC Rcd at 4249 ¶ 31 (local sales director not even minimally acquainted with his role); *Atlantic City Community Broadcasting, Inc.*, 6 FCC Rcd 925, 932 ¶ 22 (Rev. Bd. 1991), *review pending* (general manager/general partner passively acquiesced in paper proposal prepared by counsel without understanding it); *Utah Television Associates Limited Partnership*, 102 FCC 2d 1470, 1478-79 (Rev. Bd. 1985) (applicant's secretary/treasurer and news director in fact had no meaningful role).

6. The ALJ gave extra weight to Mrs. Miller's deference to Mr. Fields because she had not been employed since 1981. *Initial Decision* at 5280 ¶ 36. However, retirement, by itself, does not make an integration proposal suspect and under the circumstances here does not provide a reason for reading too much into Mrs. Miller's deference to Mr. Fields.[7] Nothing in the record suggests any health, lifestyle, or other reasons to question Mrs. Miller's ability or inclination to assume her proposed role on a full-time basis. Since retiring from teaching in 1981, Mrs. Miller has been involved in civic activities to "a significant degree" in the service area. *Initial Decision* at 5280 ¶ 37. According to the description of her numerous activties at 5283-85 n.3, her participation has been active and has included many leadership or executive roles. There is no reason on the record here to suspect that she will not bring the same energy to her proposed role at the station. As long as the applicant makes a specific integration proposal, adheres to it, and there is reasonable assurance the plan will be effectuated, integration will be awarded. *See Rancho Mirage Radio*, 7 FCC Rcd 480, 483 ¶ 12 (Rev. Bd. 1992) (integration proposal to work as sales manager credited for husband who had been retired since 1981 and whose partnership agreement gave spouse final decision-making authority on all station matters). These criteria are met here, so Mrs. Miller will be given integration credit to the extent of her twenty-five percent ownership.

7. Ackerman argues that the ALJ erred in refusing to designate financial qualifications and reporting issues against L.L. Broadcasting because two money judgments were entered against Fields personally after L.L. Broadcasting's application was filed. *Eve Ackerman*, FCC 90M-1277, released May 22, 1990. Ackerman argues that she made a *prima facie* case by showing that the judgments existed and were not reported under section 1.65, 47 C.F.R. § 1.65, and that the ALJ should not have accepted L.L. Broadcasting's explanation. In a Declaration under penalty of perjury, Wayne Fields explained that judgments of $420.04 and $679.78 had resulted from a former business partner's failure to pay his share of the debts from another business. Fields argued that the judgments did not have to be re-

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[4] Mrs. Miller testified about what her role would entail, *see, e.g.*, Tr. 86, and also said she had identified a program at the University of Florida that could provide useful training. Tr. 98.

[5] As partners, Mrs. Miller and Mr. Fields discuss the partnership's business dealings and come to agreement before she goes along with his judgment on business matters. Tr. 90. Up until the time of the hearing, Mrs. Miller had been sharing equally in the applicant's expenses, although ultimately she expected to be responsible for only twenty-five percent under the partnership agreement. Tr. 79. The applicant's money is in a joint account that she can access, and at the time of the hearing, she had written about eighty percent of the partnership's checks. Tr. 80. She also has had contact with the applicant's engineer and lawyers since the application was filed. Tr. 92-93.

[6] As was the case with one of the principals in question in *McClenahan*, Mrs. Miller's position with the station "naturally follows in the wake of her extensive prior local activities." 5 FCC Rcd at 7272 ¶ 15. *Accord, Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 951 ¶ 16 (Rev. Bd. 1982). *See* para. 6, *infra*.

[7] Ackerman's argument in her Reply Brief--that Mrs. Miller's retirement is a sufficient reason to discount her intergration proposal--is not supported by any record citations and is wholly speculative. As is clear from the following discussion, the preponderance of evidence suggests that Mrs. Miller's retirement is of no decisional significance.

ported under section 1.65, and he satisfied the judgments after Ackerman filed her petition to avoid any question about his financial qualifications. He also said he had notified his lender, who reaffirmed the loan commitment. *See* L.L. Broadcasting, Opposition to Petition to Enlarge, filed April 26, 1990.

8. We agree with L.L. Broadcasting that no issues are warranted. Under section 1.65(a), "whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall... amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate." No one suggests that the information concerns any adverse findings or adverse final action by any court or administrative body regarding "[a]ny felony; broadcast related antitrust or unfair competition; criminal fraud or fraud before another governmental unit; or discrimination," which was the information sought in FCC Form 301, Section II, Question 10 (October 1986), in effect when L.L. Broadcasting filed its application. *See generally San Joaquin Television Improvement Corporation*, 2 FCC Rcd 7004, 7004-05 ¶ 4 and 7009 n.6 (1987). The question is simply whether these judgments potentially affect L.L. Broadcasting's ability to construct and operate the station or otherwise change its financial proposal from the proposal on which it based its financial certification. *See generally Las Americas Communications, Inc.*, 6 FCC Rcd 1507, 1510 ¶ 21, 1512-13 n.12 (1991). We are satisfied from L.L. Broadcasting's explanation that they do not.

9. Although judgments could raise questions about an applicant's financial qualifications, the mere assertion that judgments are outstanding does not automatically require an issue as to an applicant's financial qualifications. As the Commission said when refusing to designate a financial qualifications issue against an applicant whose general partner was the subject of an unpaid judgment for legal fees, "Failure to pay a debt does not mean that a debtor is unable to pay." *Hefty Communications, Ltd.*, 3 FCC Rcd 6692, 6696 n.5 (Video Services Div. 1988). Ackerman's arguments to the contrary here are purely speculative and grossly overread the applicability of the cases on which she relies. For example, in *Las Americas*, the Commission designated qualifying financial and character issues against an applicant after the applicant's bank refused to release funds for a settlement of the Commission proceeding without an indemnification from the applicant. A creditor of the applicant had brought suit to enjoin the settlement if the debt owed to it were not paid first. In addition, the amount of the debt involved in the lawsuit exceeded the applicant's cushion in its financial proposal for the station, and the applicant had misled the Commission about its problems. *See* 6 FCC Rcd at 1509-10, 1512-13 n.12. In contrast, in this case we have Field's unrebutted declaration under penalty of perjury that he notified L.L. Broadcasting's lender of the judgments, and the lender reaffirmed its commitment to make funds available.[8] Furthermore, in light of the lack of any indication that L.L. Broadcasting lost its reasonable assurance of financing and misled the Commission about it, the court's admonition to hold hearings when there are substantial and material

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[8] The lender's reaffirmation of its commitment also distinguishes the situation here from that which led the presiding officer to designate a financial qualifications issue in *Silver Springs Communications*, FCC 89M-114, released Jan. 18, 1989. There the ALJ designated an issue against an applicant whose general partner had outstanding an unpaid judgment of $1,000 plus costs and interest, but other questions had been raised about the bona fides of the applicant's bank loan letter. The lender's reaffirmation also distinguishes this case from *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166, 168 ¶ 3 (1980), where the Commission said it would not require equipment suppliers to demonstrate their satisfaction with an applicant/customer's financial condition as long as there was no specific showing that an applicant's credit-worthiness is subject to doubt.

The additional cases that Ackerman string cites are equally distinguishable on their facts. *Weyburn Broadcasting Limited Partnership*, 5 FCC Rcd 861 (Rev. Bd. 1990) states the principle that, if an applicant loses reasonable assurance of financing after filing its application, it must report the loss to the Commission. In *Weyburn*, the Board added financial and reporting issues because there were significant changes in the financial circumstances of the partners who were to guarantee the bank loan personally, the applicant did not pay the current expenses incurred in prosecuting its application, the bank was not notified of the guarantors' changed circumstances, and lawsuits for a total of $19,000 had been filed against the sole voting stockholder. In *Tri-State Communications*, 4 FCC Rcd 8258 (Rev. Bd. 1989) (subsequent history omitted), an applicant who was in bankruptcy conceded that it was not financially qualified after an issue had been designated. In *Cosmopolitan Enterprises, Inc.*, 49 FCC 2d 934 (Rev. Bd. 1974), the Review Board enlarged a reporting issue already designated against a permittee, because it had not reported a judgment against it as required by the application form in use at that time. (Comparable information is not required by the form used by L.L. Broadcasting.) Under the circumstances of *Cosmopolitan*, the Board was concerned that there had been a pattern of reporting violations. In *WNER Radio, Inc.*, 27 FCC 2d 1033 (Rev. Bd. 1971), the Board designated a financial issue when it learned that the property the applicant proposed to use as security for a bank loan was not owned by the applicant and was already subject to other mortgages. In *WMGS, Inc.*, 13 RR 2d 327 (Rev. Bd. 1968), a renewal applicant in a comparative renewal case had consistently operated from a deficit position but had failed to demonstrate that its parent corporation, from whom it expected to receive funding, had the means to provide the funding. The parent corporation and the applicant were both subject to a judgment in excess of $138,000, and the applicant's stock had been pledged as collateral for the parent's obligation, but the applicant did not timely report either matter. In those circumstances, the Board designated reporting and financial issues. Finally, in *Fidelity Radio, Inc.*, 1 FCC 2d 1145 (Rev. Bd. 1965), the Board designated a character issue against an applicant whose principal had been found to have misappropriated a broadcast station's funds in a state court judgment. Because the applicant did not amend its application to report this judgment, the Board also added a reporting issue. Given the great disparity in the facts between the case at hand and those cited by Ackerman, Ackerman's outrage at "financial deadbeats" at page 9 of its Contingent Exceptions is misdirected to L.L. Broadcasting.

questions of fact concerning an applicant's basic qualifications is not relevant here. *See David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253 (D.C. Cir. 1991).

10. Ackerman also argues that Fields should not receive integration credit because he has a history of breaking promises. According to Ackerman, Fields had folded two unsuccessful businesses, leaving behind unpaid taxes and a loan that was secured by state and [federal government agency guarantees. Thus, Ackerman argues, the Commission cannot rely on Fields to adhere permanently to his integration promise here. Ackerman claims that the ALJ erred in preventing her from pursuing Fields' business background during cross examination about Fields' integration proposal. In support of her argument, Ackerman relies on the "general principles" of *Knoxville Broadcasting Corp.*, 103 FCC 2d 669, 680, 683 (Rev. Bd. 1986), a case where the Board denied integration credit because an applicant had made conflicting promises to work full time in two separate businesses, one in order to qualify for integration credit before the Commission and the other to qualify for minority business benefits from the Small Business Administration. The ALJ did allow Ackerman to question Fields about whether he had commitments that would conflict with his integration proposal, Tr. 122, a line of questioning that did not undermine Fields' integration pledge, but he prevented Ackerman from merely fishing in Field's background. Although he found the connection between Field's previous business and his integration pledge "far too tenuous" to pursue during the hearing, Tr. 121, and Ackerman's arguments difficult to follow, Tr. 146, the ALJ did tell Ackerman she could petition to pursue her point later if she could clarify it. Tr. 121. Further, if she believed malfeasance was involved, she was advised to follow the appropriate procedures for filing a motion to enlarge the issues. Tr. 151. Ackerman did neither. Ackerman's exception is denied. The ALJ did not err in keeping the hearing focused on matters relevant to the designated issues. *Cf. Priscilla L. Schwier*, 4 FCC Rcd 2659 (1989) (ALJ did not err in refusing to pursue or allow pursuit of matters not in issue) (subsequent history omitted).

COMPARATIVE CONSIDERATIONS

11. Exceptions also have been raised about the basic and comparative qualifications of both Ackerman and Harmon. For purposes of comparing them with L. L. Broadcasting, the Board has assumed that the exceptions would be resolved in their favor and that each is entitled to the full quantitative integration credit sought. Thus, the Board does not have to reach the exceptions on these points.

12. In its *Policy Statement*, the Commission declared that participation of ownership in the management of the proposed station, "integration," is a factor of substantial importance. 1 FCC 2d at 395. "It is inherently desirable that legal responsibility and [full-time integration in] day-to-day performance be closely associated." *Id.* Each of the applicants here has sought integration credit, and none has challenged the applicability of the factor in this case. [9]

13. When there are no quantitative integration differences between the applicants, as we are assuming here, the Commission looks to qualitative enhancements to distinguish them. Among the decisional enhancements to be considered in this case are local residence and civic participation, minority ownership, and past broadcast experience. *Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5065 (1989) (subsequent history omitted). The local residence/civic activity and minority ownership factors are deemed of equal weight. *Radio Jonesboro, Inc.*, 100 FCC2d 941, 945 (1985) (subsequent history omitted). Past broadcast experience is deemed of minor significance. *Policy Statement*, 1 FCC 2d at 396.[10]

14. Under Commission precedent, L.L. Broadcasting is entitled to significant credit under the unified local residence/civic activities factor. Fields, L.L.'s seventy-five percent owner, has lived in the service area for nearly thirty-five years and plans to move to Alachua if L.L.'s application is granted. *Initial Decision* at 5279 ¶27, and has been involved in a number of civic activities in both leadership and participant roles since about 1979.[11] Miller, L.L.'s twenty-five percent owner, has lived in the service area since 1962 and has been involved to a significant degree in the civic affairs of the service area in both leadership and participant roles since 1977. Her activities are described in *Initial Decision* at 5283 n.3. The long-term residence and civic involvement of both Fields and Miller demonstrate a commitment to and continuing knowledge of, and interest in, the service area. *See Colonial Communications, Inc.*, 7 FCC Rcd 674 (1992). In addition, both are entitled to enhancement credit as minority owners. *See Initial Decision* at 5279 ¶¶ 27, 29, 5280 ¶¶ 35, 37. Fields also has extensive past broadcast experience in both management and staff positions, which the ALJ concluded entitled the applicant to slight credit under the broadcast experience factor. *Id.* at ¶¶ 28, 35.

15. Ackerman also has long-term residence in the service area, where she has lived since 1973, *id.* at 5278 ¶ 15, and she has been involved in community activities in both leadership and membership roles since about 1979. *See id.* at ¶ 16. L.L. Broadcasting disputes the amount of credit given for her civic activities because some of her activities were undertaken in connection with her paid employment. Similar arguments have been rejected in *National Communications Industries*, 6 FCC Rcd 1978, 1982 ¶¶ 24-25 (Rev. Bd. 1991), *modified on other grounds*, 7 FCC Rcd _____ (FCC 92-77, released Feb. 28, 1992), and *McClenahan Broadcasting, Inc.*, 5 FCC Rcd 7269, 7273 (Rev. Bd. 1990). Under the *Policy Statement*, "[p]ast *partici-*

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[9] *But cf. Susan M. Bechtel v. FCC*, *supra* note 3.

[10] Ackerman and L.L. Broadcasting also claim enhancement credit because both Eve Ackerman and Geraldine Miller are women. *But see Jerome Thomas Lamprecht v. FCC*, No. 88-1395 (D.C. Cir. February 19, 1992) (sex-preference policy violates the Fifth Amendment of the United States). In this case, no party has challenged the constitutionality of the gender preference. The Commission has not yet indicated its response to *Lamprecht* and we shall not consider the gender preference claims, which would not have been decisional in this case in any event. *See, e.g., Fresno FM Limited Partnership*, 6 FCC Rcd 6998, 6999 (1991).

[11] Fields submitted an impressive list of civic activities, which the ALJ enumerated in his *Initial Decision* at 5283 n.2. The credit here is awarded for activities in which he participated before filing L.L. Broadcasting's application. Civic participation after filing is entitled only to minimal credit because of the Commission's concern about comparative upgrading. *Colonial Communications, Inc.*, 6 FCC Rcd 2296, 2297 ¶11.

pation in civic affairs will be considered... as will *any other local activities* indicating a knowledge of and interest in the welfare of the Community." 1 FCC 2d at 396 (emphasis added). "[L]ocal activities that evince civic participation in the affairs of the service area, even though work-related," will be credited. *National Communications Industries*, 6 FCC Rcd at 1982 ¶ 25.[12] For professional and other activities where the civic nexus is not clear, however, Ackerman has the burden of showing this nexus. To the extent she has not met this burden, her activities will be discounted. In addition, several of her activities are post-filing activities, and as is the case with Fields, she will be given only minimal credit for these. *See Colonial Communications, Inc.*, 6 FCC Rcd 2296, 2297 ¶ 11 (1991), *recon. dismissed*, 7 FCC Rcd 674 (1992). Ackerman is also entitled to enhancement credit for her past broadcast experience. However, L.L. Broadcasting's application is preferred to hers because of the longer term service area residence of both of its general partners, who were actively involved in civic activities, and the significant credit to which L.L. is entitled for minority ownership.

16. Both Elvin and Brent Harmon, Harmon's general partners, plan to move to Alachua if Harmon's application is granted. *Initial Decision* at 5281 ¶¶ 52, 53. They have not lived in the Alachua area and have not been involved in civic activities in the area. Under the *Policy Statement*, "[p]roposed future local residence... will also be accorded less weight than present residence of several years' duration." 1 FCC Rcd at 396. Because the credit to which Harmon is entitled under this factor is substantially less than that to which both Ackerman and L.L. Broadcasting are entitled for their long-term service area residences and civic activities and the additional credit to which L.L. Broadcasting is entitled for minority ownership, Harmon cannot prevail here, even if Elvin Harmon is given the integration credit he claims. The broadcast management experience claimed by Brent Harmon, *see Initial Decision* at 5281 ¶ 54, is not of sufficient weight to overcome this disparity and the broadcast experience credit claimed by the other applicants. We, therefore, reverse the ALJ's grant of Ackerman's application and grant the application of L.L. Broadcasting because of the superior qualitative enhancements to which its fully integrated partners are entitled.

17. ACCORDINGLY, IT IS ORDERED That the Motion to Dismiss filed by Eve Ackerman on October 23, 1991, IS GRANTED and the application of Alachua Broadcasters, Inc., File No. BPH-871124MN, IS DISMISSED with prejudice pursuant to 47 C.F.R. § 1.276(f) for failure to prosecute.

18. IT IS FURTHER ORDERED That the application of Wayne G. Fields and Geraldine Y. Miller d/b/a L.L. Broadcasting, File No. BPH-871124ME, IS GRANTED and the applications of Eve Ackerman, File No. BPH-871123MA, and Brent L. Harman and Elvin L. Harmon d/b/a Harmon Broadcast Partners, File No. BPH-871124MQ, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

[12] In *Broadcast Associates of Colorado, Inc.*, 100 FCC 2d 616 (Rev. Bd. 1985), *rev'd on other grounds*, 104 FCC 2d 16 (1986), cited by L.L. Broadcasting, a broadcaster did not receive credit for reporting activities because he did not participate in the activities as required by the *Policy Statement*. Thus, the denial of credit there is fully consistent with decisions granting credit for participation in job-related civic activities.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-290

In re Applications of

JOHNNY V. GOMEZ	File No. BPH-901121MB
NORTH PLAINS BROADCASTING CORPORATION	File No. BPH-901123MB
MANDUJANO COMMUNICATIONS, INC.	File No. BPH-901123MC

For Construction Permit for
New FM Station, Channel 265C1,
Amarillo, Texas

ORDER

Adopted: March 31, 1992; Released: April 21, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

1. On January 10, 1992, Johnny V. Gomez (Gomez) and North Plains Broadcasting Corporation (North Plains) filed an Appeal From The Presiding Officer's Final Ruling. Thereafter, on March 20, 1992, they filed a Report stating that "the reason for the appeal of Gomez and North Plains no longer exists."

2. ACCORDINGLY, IT IS ORDERED, That the "Appeal From The Presiding Officer's Final Ruling" filed January 10, 1992 by Johnny Gomez and North Plains Broadcasting Corporation IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-80

In re Applications of

PETER JOSEPH DEVLIN File No. BPH-880216MS
and PATRICIA EVE DEVLIN

Earl J. Brooker File No. BPH-880217ML
and Carol L. Brooker
d/b/a BROOKER BROADCASTING

For Construction Permit for
New FM Station, Channel 282A
(104.3 MHz), Seymour, Wisconsin

Appearances

Peter Joseph Devlin and Patricia Eve Devlin, pro se; and *Jerrold D. Miller*, on behalf of Earl J. Brooker and Carol L. Brooker d/b/a Brooker Broadcasting.

DECISION

Adopted: March 31, 1992; Released: April 22, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

Board Chairman MARINO:

1. The *Initial Decision*, 6 FCC Rcd 5850 (1991)(I.D.) of Administrative Law Judge John M. Frysiak (ALJ) denied the application of Peter Joseph Devlin and Patricia Eve Devlin (Devlin) under a financial qualifications issue and granted the remaining basically qualified application of Brooker Broadcasting (Brooker). On November 14, 1991, Devlin filed a 4-page appeal, claiming that the ALJ misapplied the Commission's financial standard. Appeal, p. 2. We affirm the ALJ's legal conclusion, which is fully supported by uncontested factual findings and controlling precedent.

BACKGROUND

2. Devlin requires $400,000 to meet projected construction and first three months operating expenses. 6 FCC Rcd at 5851 para. 9. To meet these costs, Devlin relies on a loan commitment letter from Valley East Bank, in Green Bay, Wisconsin. *Id.*, para. 11. Based upon the testimony of the bank's Vice-President and Branch Manager, Lee Hietpas, the ALJ made the following undisputed findings:

> Mr. Hietpas advised Devlin that the bank loan committee would have to have sufficient information on *security*, *collateral* and *repayment capacity* before the financial loan approval would be forthcoming (Tr. 308-309).
>
> Mr. Hietpas did not discuss specific collateral requirements with Devlin, although he expected and told Devlin that collateral would be required. Collateral would be determined at the time the formal loan commitment application was considered (Tr. 311-312, 317).

6 FCC Rcd at 5852, paras. 17-18 (emphasis added).

3. Devlin has not disputed the ALJ's additional finding that:

> At the Phase II hearing, Mr. Devlin admitted he did not have any understandings with anyone to guarantee the $400,000 loan and that he had no collateral to secure the loan, other than the station equipment to be purchased. (Tr. 291-292).

Id., para. 19. From these findings, the ALJ derived the following conclusion:

> In the instant case the financial statements of the Devlins do not indicate that they have sufficient collateral to guarantee the loan. No source of collateral was considered by the bank. Inasmuch as specific collateral was not considered, it must be deemed that Devlin's Valley Bank letter is fatally deficient and at best an accommodation letter. *See Scioto Broadcasters*, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990). Based on the foregoing, it is ruled that Devlin did not have the reasonable assurance of adequate financing at the time it submitted its application and is presently financially unqualified.

6 FCC Rcd at 5856 para. 68.

DISCUSSION

4. Devlin's sole legal argument on appeal is that the ALJ employed an "absolute assurance" rather than the "reasonable assurance" standard utilized by the Commission. *See, e.g., Scioto Broadcasters, Limited Partnership*, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990), *review denied*, 6 FCC Rcd 1893 (1991). Devlin argues that it did not believe it could discuss formal subjects such as "collateral" with the bank until it obtained a construction permit from the Commission, adverting to the commitment letter that "collateral requirements would be [discussed as] part of the formal loan application process." App., pp. 2-3.

5. Our review of the undisputed findings, however, discloses no error on the part of the ALJ in disqualifying Devlin on the financial issue. Although an applicant need not have a binding written agreement, when relying upon a bank loan commitment for funding, to certify that it is financially qualified, *Las Vegas Valley Broadcasting Co. v. FCC*, 589 F.2d 594, 599-601 (D.C. Cir. 1978), it must, under well-settled Commission precedent, establish a sufficient dialogue with the bank, so that the latter has a "present firm intention to make [the] loan, future conditions permitting." *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166, 167 (1980). As we stated in *Scioto*, 5 FCC Rcd at 5160:

> [I]n order for the Board to determine that an applicant has "reasonable assurance" of "committed sources of funds" from a lending institution, we will review the following factors: Whether (1) the bank has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data, *see Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978); or, (2) the prospective borrower has provided the bank with such data, and the bank is sufficiently satisfied with this financial information (*e.g.*, collateral guarantees, *see Chapman Radio and Television Co.*, 70 FCC 2d 2063, 2072 (1979)) that, *ceteris paribus*, a loan in the stated amount would be forthcoming, and that the borrower is fully familiar with, and accepts the terms and conditions of the proposed loan (*e.g.*, payment period, interest rate, collateral requirements, and other basic terms).

That dialogue was not established here. The record fully supports the ALJ's finding that Devlin was aware that collateral would be a necessary element of any bank loan along with additional guarantees, since, as Heitpas observed, the Devlins "could not have supported," on their own, a loan of $400,000. Tr. 306. Heitpas testified: "We -- we would not have committed, from the aspect of making the loan, just as it stood right there." Tr. 308. He added:

> I made it specific to Mr. Devlin that this, you know, this is not an approval of the loan at all and that by no means are we committing these funds to you, because on, you know, as far as the loan goes with his assets and his liabilities and net worth that he has, that the loan couldn't be approved . . . .

Tr. 307. For his part, Peter Devlin acknowledged that he had not spoken with anyone about cosigning a note (Tr. 291) and that he "had no idea what would be required of collateral" at that time (Tr. 336).

6. Commission precedent is clear that an applicant may not certify its financial qualifications and then arrange financing. *See, e.g., Pepper Schultz*, 103 FCC 2d 1052, 1058-1059 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 1476 (1987) (subsequent history omitted). It was incumbent on Devlin to firm up the terms and provisions underlying the purported bank loan. It did not do so. Given the undisputed findings above, the ALJ's ultimate conclusion that Devlin did not establish "reasonable assurance" of committed sources of funds from a lending institution was fully consistent with Commission precedent. *See, e.g., Texas Communications Ltd. Partnership*, 6 FCC Rcd 1260 (Rev. Bd. 1991) (burden of proving its financial qualifications in a timely fshion at hearing is on the applicant), *review denied*, 6 FCC Rcd 5191 (1991). Devlin is not financially qualified and its application must be denied. We therefore affirm the ALJ's grant of Brooker's basically qualified application.

7. ACCORDINGLY, IT IS ORDERED, That the Contingent Exceptions filed November 13, 1991, and the Motion to Strike filed November 19, 1991, by Brooker Broadcasting, ARE DISMISSED as moot;

8. IT IS FURTHER ORDERED, That the application of Peter Joseph Devlin and Patricia Eve Devlin (File No. BPH-880216MS), IS DENIED; and, that the application of Earl J. Brooker and Carol L. Brooker d/b/a Brooker Broadcasting (File No. BPH-880217ML) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-402

In re Applications of

HELEN BROADCASTERS, INC. File No. BPH-890426MI

ANTHONY LAMAR CANUP and GEORGE M. PASS d/b/a WHITE COUNTY BROADCASTING File No. BPH-890427ME

For Construction Permit for a New FM Station on Channel 286A at Helen, Georgia

Appearances

Richard Hildreth, Esq., and Anne Goodwin Crump, Esq., on behalf of Helen Broadcasters, Inc.; and, Lawrence J. Bernard, Jr., Esq., on behalf of White County Broadcasting.

DECISION

Adopted: April 1, 1992; Released: April 21, 1992

By the Review Board: BLUMENTHAL, ESBENSEN and GREENE. Board Member BLUMENTHAL Concurring *Dubitante* with Statement.

Board Member GREENE:

1. Before the Review Board is the *Initial Decision* of Administrative Law Judge Joseph Chachkin (ALJ), 6 FCC Rcd 6064 (1991), which awarded the construction permit for a new FM station at Helen, Georgia, to Helen Broadcasters, Inc. (HBI) and denied the competing application of Anthony Lamar Canup and George M. Pass d/b/a White County Broadcasting (WCB). WCB filed exceptions and HBI submitted a reply.[1] For the reasons set forth below, we affirm the ALJ's grant of HBI's application.

2. The ALJ heard and decided the case under the standard comparative issue, which is currently governed by the guidelines set forth by the Commission in its *Policy Statement on Comparative Broadcast Hearings* (*Policy Statement*), 1 FCC 2d 393 (1965). After hearing evidence on the issue, the ALJ concluded that HBI was the preferred applicant based on its superior quantitative integration proposal. HBI was awarded 100% integration credit for the full-time participation of its 100% stockholder, Charles Smithgall, into the management of the proposed station. WCB received 50% integration credit for its proposal to integrate 50% general partner George M. Pass. Due to the magnitude of the quantitative integration credit differential between the two applicants, the ALJ did not compare qualitative factors. *See Miracle Strip Communications*, 4 FCC Rcd 5064 (1989). He found the parties to be of equal weight under the diversification, coverage, and auxiliary power criteria. WCB excepts only to the ALJ's award of integration credit to HBI.

3. In choosing among qualified competing applicants for new broadcast facilities, the Commission considers full-time participation in station operations by owners to be a factor of "substantial importance." *Policy Statement*, 1 FCC 2d at 395.[2] Applicants proposing such participation, however, must establish the overall reliability of their integration proposals in order to receive comparative credit. *Royce International Broadcasting*, 5 FCC Rcd 7063 (1990). The burden of proof is on the applicants to demonstrate that their principals will effectuate their integration proposals. *Cuban-American Limited*, 5 FCC Rcd 3781, 3875, *recon. dismissed sub nom. Miami Latino Broadcasting Corp.*, 5 FCC Rcd 7321 (1990).

4. WCB challenges the ALJ's award of quantitative integration credit to HBI. It asserts that Charles Smithgall's continuing stewardship of Dukes Creek Woods, a 5,500 acre nature conservation project, renders unreliable his full-time integration pledge in light of HBI's failure to timely submit a showing demonstrating how Mr. Smithgall will accommodate his ongoing involvement in the project with his full-time management of the proposed Helen station. WCB further maintains that the ALJ erred in allowing into the record Mr. Smithgall's written and oral testimony concerning his integration plan in view of HBI's failure to propound an accommodation showing by either the integration statement or hearing exhibit exchange dates.

5. At issue is Mr. Smithgall's continuing involvement with Dukes Creek Woods which is situated adjacent to Helen. Mr. Smithgall founded the project in the early 1980's when he began purchasing and assembling parcels of land to form a conservation area. Mr. Smithgall is now the largest private landowner in White County. *Initial Decision*, ¶¶ 9, 14. The goal of the project is to restore the land to its original condition of a mature hardwood forest inhabited by varied wildlife. The project includes reforestation of cropland; removal of weed trees; creation of attractive wildlife habitat; removal of trash and debris; and erosion control. HBI Exh. 2, p. 5. Mr. Smithgall has worked with the Georgia Conservancy, the National Conservancy, the Georgia Department of Natural Resources, the Georgia Forestry Service, and the Chattahoochee National Forest in formulating his various plans for the project. He has also worked with numerous local and county officials and community leaders. *Initial Decision*, ¶¶ 15-17, 20.

[1] We deny WCB's request for oral argument. The issues posed in the instant proceeding are not complex. The Board foregoes oral argument where it would not lend valuable assistance in resolving the issues before it. *See Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 163 (1991).

[2] *But cf. Bechtel v. FCC*, No. 91-1112 (D.C. Cir. Jan. 31, 1992) (remand to consider continuing validity of integration criterion); FCC News Release, DC-2072, GC Docket No. 92-52, released Mar. 12, 1992 (announcing reexamination of the *Policy Statement*). The applicability of the integration factor was not challenged in this case.

6. Mr. Smithgall is a retired broadcaster and businessman. In the 1980's, he sold his cable system interests and devoted his full time to the development of the reforestation project. *Initial Decision*, ¶¶ 8, 14; Tr. 34. Mr. Smithgall has spent approximately $12 million of his personal funds on the project which maintains a staff of twelve employees. *Initial Decision*, ¶ 18. At hearing, Mr. Smithgall testified that the staff size had recently diminished somewhat as the project is nearing completion. *Initial Decision*, ¶ 9; Tr. 98. In 1985, Mr. Smithgall hired Howard Page, a Montana logger, to supervise the logging and reforestation operations. HBI Exh. 2, p. 5. The logging operations, which utilize horses instead of conventional machinery in order to minimize damage to the young hardwoods, are not a commercial venture and they generate no profits. *Initial Decision*, ¶ 16. The personnel are supervised by Mr. Page and his assistant, Bob Hershey. Tr. 153, 164. Mr. Smithgall has no direct supervisory role over these operations and personnel. *Initial Decision*, ¶ 9, Tr. 39.

7. Mr. Smithgall testified that the Dukes Creek Woods project is on the verge of maturity and is in the process of winding down. Tr. 145. The planting operations are complete and there is only one additional parcel that he hopes to purchase should it become available. Tr. 101. This acquisition would take very little time. *Initial Decision*, ¶ 9; Tr. 146-47. Mr. Smithgall explained that his plan is now to let the project mature naturally. Tr. 101. He does not expect to witness the actual culmination of the project, because the forest will not mature to its original timber species mix within his lifetime. *Initial Decision*, ¶ 19; HBI Exh. 2, p. 6. Mr. Smithgall testified that he devotes one hour per week on the "nuts and bolts" of the operation. Tr. 127. He spends additional time on the land walking and horseback riding for recreational purposes. *Initial Decision*, ¶ 9; Tr. 128, 146.

8. In *Order Prior to Prehearing Conference*, FCC 90M-3147, released October 4, 1990, the ALJ required the parties to file integration and diversification statements. In footnote 1 to that order, he set forth the following instruction:

> Full disclosure must be made as to whether the integrated principals intend to withdraw (partially or fully) from their current employment or business pursuits which require their time and attention. Failure to so disclose will result in no integration credit being awarded such principal. *Kennebec Valley Television, Inc.*, 2 FCC Rcd. 1240 (1987).

In response, HBI's integration statement provides that Mr. Smithgall is retired and will terminate any employment prior to the commencement of program tests at the proposed station. WCB Exh. 8. HBI also divulged in the statement its intention to claim qualitative enhancement credit for Mr. Smithgall's civic involvement in area conservation and forestry activities. *Id.* at 2-3. The ALJ also required the parties to exchange direct written case exhibits. *Order*, FCC 90M-3801, released December 3, 1990. HBI's direct written case described Mr. Smithgall's involvement in Dukes Creek Woods in some detail, but was silent as to the specific degree of his present involvement and his future involvement in the project should HBI's application be granted. HBI Exh. 2.

9. Generally, where an integrated principal plans to retain significant ongoing outside business interests or employment, its integration commitment is rendered questionable in the absence of a specific and convincing plan demonstrating that such interests can be accommodated with full-time station management. *Coastal Broadcasting Partners*, 7 FCC Rcd 1432, 1433 (1992); *Pleasure Island Broadcasting, Inc.*, 6 FCC Rcd 4163, 4165 (Rev. Bd. 1991); *Blancett Broadcasting Co.*, 17 FCC 2d 227, 230 (Rev. Bd. 1969). WCB's reliance on this principle is misplaced here. The flaw in WCB's thesis is that Mr. Smithgall's activities are neither business nor employment-related, nor are they of a substantial nature. The Dukes Creek Woods project is a non-profit endeavor, more akin to a civic activity than a business. Moreover, the ALJ's procedural orders did not expressly require HBI to disclose prior to the hearing specific plans regarding its principal's civic activities, but only its "current employment and business interests." HBI cannot thus be faulted for not having detailed the extent of Mr. Smithgall's conservation activities in its prehearing statements.

10. While we generally agree with WCB's premise that a principal's civic involvement could be so vigorous that such interests would prompt the question of the reliability of that principal's integration proposal,[3] we do not believe that the instant case presents such a question. The record evidence indicates that Mr. Smithgall's work on the Dukes Creek Woods project does not now occupy a significant amount of his time and is not likely to require much attention in the future. HBI's Smithgall has consistently maintained throughout this proceeding that he will devote a minimum of 40 hours per week to the management of the proposed station. We conclude that WCB has not raised such *"facially questionable aspects"* of HBI's integration proposal as to cause us to doubt Mr. Smithgall's ability to effectuate his commitment to the station. *See Atlantic City Community Broadcasting, Inc.*, 6 FCC Rcd 925, 932 (Rev. Bd. 1991) (emphasis in original). We find that HBI has met its burden of demonstrating a reasonable likelihood that Mr. Smithgall's integration commitment will be effectuated even though he plans to continue his limited conservation activities. *Coastal Broadcasting Partners*, 7 FCC Rcd at 1433.[4]

11. WCB also argues that Mr. Smithgall will not follow through his commitment to manage the Helen station on a full-time basis. To receive credit, integration proposals must be adhered to on a permanent basis. *Policy Statement*,

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[3] *See, e.g., Julia S. Zozoya*, 5 FCC Rcd 856 (Rev. Bd.), *rev. denied*, 5 FCC Rcd 6607 (1990), *recon. denied*, 6 FCC Rcd 4416 (1991) (integration credit denied to applicant who proposed to integrate into the management of two stations 135 miles apart, 40 hours per week at the one station and 30 at the other, while maintaining a schedule of 25 hours of civic activities per week).

[4] We also agree with WCB's observation that the ALJ's analysis was somewhat misdirected on this issue. The ALJ concluded that Mr. Smithgall's conservation activities did not raise a question of effectuation as would continuing employment or business interests because Mr. Smithgall is in control of his own destiny and no demands are placed on his time. *Initial Decision*, ¶ 40. The proper analysis is not simply whether the principal may be compelled by extrinsic forces to perform extra-integration activities, but whether the integration pledge is *reliable* in light of its other activities, obligations, and interests. *Frank Digesu, Sr.*, 7 FCC Rcd 837, 841-42 (Rev. Bd. 1992), *citing, Royce International Broadcasting*, 5 FCC Rcd 7063 (1990).

1 FCC 2d at 395 n.6. *See also Victorson Group, Inc.*, 6 FCC Rcd 1697, 1699 (Rev. Bd. 1991). WCB asserts that Mr. Smithgall's integration plan is not permanent because he will continue to maintain offices and residences outside of Helen in Gainesville and Atlanta, Georgia.[5] Mr. Smithgall testified that his Atlanta office manages his finances and personal investments and that the Gainesville office houses his personal secretary and acts as a clearinghouse for him and his wife. He spends no time supervising either office. *Initial Decision*, ¶ 8; Tr. 53, 149. He keeps living quarters in Atlanta and his wife owns a house in Gainesville, although he characterized both residences as mere "mailing addresses." Tr. 41, 63, 67, 113, 150, 163. Mr. Smithgall testified that he spent approximately 150 nights in Helen and 100 nights each in Gainesville and Atlanta in 1989 and also in 1990. *Initial Decision*, ¶ 12; Tr. 54, 148-49. He predicted that in 1991 he would spend nearly all of his time in Helen and that he considers Helen to be his legal residence. Tr. 149, 153. Mr. Smithgall moved into his $750,000 Helen house after its construction was completed in November, 1990. He formerly resided in a guest house on the property, from 1982 or 1983 until 1985, and then in a caretaker's house there. Tr. 51, 114-15, 141. All three of these houses are on the same tract of land, portions of which lie within Helen's town limits. *Initial Decision*, ¶¶ 10-12.

12. Mr. Smithgall's hearing testimony indicated that he will continue his current practice of visiting Atlanta on Fridays and returning to Helen on the following Saturdays. Tr. 52-53, 63-64. He stated that while in Atlanta, he would conduct station business by calling on national and regional advertising representatives located there. *Initial Decision*, ¶ 5; Tr. 122, 125. Mr. Smithgall's visits to Atlanta to conduct station business are not inconsistent with his full-time integration commitment. *TRC Communications, Inc.*, 59 RR 2d 92, 94 (Rev. Bd. 1985), *rev. denied*, FCC 86-283, released June 9, 1986, *aff'd sub nom. Cascade Broadcasting Group, Ltd. v. FCC*, 822 F.2d 1172 (D.C. Cir. 1991). Accordingly, we do not find that Mr. Smithgall's brief regular visits to Atlanta, ostensibly to contact advertisers, render HBI's integration proposal impermanent.[6]

13. WCB further argues that Mr. Smithgall's integration is impermanent because he is likely to have the station's staff take over his managerial duties once their training is completed. Mr. Smithgall's hearing testimony does not support this conclusion. Mr. Smithgall indicated that once trained, his staff will merely supplement him, not supplant him. *Initial Decision*, ¶ 44; Tr. 157. Although his testimony also shows that he will perform numerous non-managerial tasks simultaneously with his managerial duties, such a blend of activities is a realistic mix for a general manager of a fledgling radio station with a staff of four. *See, e.g., Victorson Group, Inc.*, 6 FCC Rcd at 1699-1700; *Tulsa Broadcasting Group*, 2 FCC Rcd 6124, 6128 (1987), *rev. denied*, 3 FCC Rcd 4541 (1988); *Debra D. Carrigan*, 100 FCC 2d 721, 738 (1985).[7]

14. ACCORDINGLY, IT IS ORDERED That the application of Helen Broadcasters, Inc. (File No. BPH-890426MI) for a new FM broadcast station at Helen,

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[5] Helen is approximately 30 miles from Gainesville and 80 miles from Atlanta. *Initial Decision*, ¶ 12.

[6] WCB did not raise any question as to whether Mr. Smithgall's Friday forays into Atlanta where he "check[s] on" his personal investment business raise questions concerning the effectuation of his commitment to be integrated on a full-time basis. Tr. 51. Although Mr. Smithgall testified that his Atlanta travels would simply be converted to station business trips once he becomes general manager of the Helen station, the record is silent regarding the amount of time that Mr. Smithgall will spend on personal business on Fridays, and whether the time not spent on station business will detract from his full-time status. *See George Henry Clay*, 5 FCC Rcd 317, 319 (Rev. Bd.) *recon. denied sub nom. Alabama Radio Movement, Inc.*, 5 FCC Rcd 2997 (1990) (full-time integration credit awarded to principal who performed duties as a county commissioner on Mondays and worked full-time at the station on Tuesdays through Saturdays). The ALJ found credible Mr. Smithgall's testimony that he would work at the station 40 or more hours each week without requiring further explanation. *Initial Decision*, ¶¶ 39, 42.

The question of whether the Atlanta activities undermine the reliability of Mr. Smithgall's full-time integration proposal is not decisional here. Even if Mr. Smithgall's integration were reduced to reflect his absences on Fridays, assuming a worst case scenario where the full day is lost to personal activities, HBI would still be the superior applicant on a comparative basis. Using the Hirschman-Herfindahl Index (HHI), HBI would receive a score of 6400, assuming a 32-hour work week (reflecting 8 hour days, Mondays through Thursdays), while WCB would receive a score of 5000. *See generally Omaha TV 15, Inc.*, 4 FCC Rcd 730, 734 (1988). The use of the HHI formula is appropriate here because we can estimate with reasonable assurance based on the record the *minimum* extent of the principal's integration activities. *Compare Kennelwood Broadcasting Co., Inc.*, 6 FCC Rcd 2894, 2895 (Rev. Bd. 1991), *rev. denied*, 7 FCC Rcd 520 (1992) (no part-time integration credit awarded where no record basis to determine the actual number of hours to be worked), *citing Cuban American Ltd.*, 5 FCC Rcd 3781, 3785 (1985). The magnitude of the difference between the resulting scores, being greater than 1250 points, is such that the qualitative integration criteria would not be considered and HBI would win by virtue of its superior quantitative integration. *See Miracle Strip Communications, Inc.*, 4 FCC Rcd at 5065-66.

[7] We further reject WCB's belated effort to draw an analogy between Mr. Smithgall's long past involvement with station WRNG, North Atlanta, Georgia, and his integration proposal in the instant proceeding. WCB alleges that Mr. Smithgall pledged in a 1959 application to be general manager of the proposed North Atlanta station, but abandoned the position soon after the station went on the air in 1967. We find no reason to question the ALJ's rejection of WCB's post-hearing efforts to place into the record certain documents from the Commission's archives relating to this matter. *See Memorandum Opinion and Order*, FCC 91M-1383, released April 19, 1991. WCB has not demonstrated the relevance of Mr. Smithgall's conduct over twenty years ago. WCB does not indicate that Mr. Smithgall's North Atlanta integration proposal was made in bad faith. We conclude that the pre-*Policy Statement* proceeding is too remote in time to be considered here. Moreover, the Smithgall applicant there settled with the only mutually exclusive applicant for the channel. *North Atlanta Broadcasting Co.*, 36 FCC 1519, 1519 n.1 (Hearing Examiner 1963) (subsequent history omitted). Today, under the policy expressed in *Ruarch Associates*, 103 FCC 2d 1178 (1986), we would not consider such an applicant to be bound to its integration proposal in the absence of a showing of bad faith. *See, e.g., Sarasota-Charlotte Broadcasting Corporation*, 5 FCC Rcd 3837, 3840 (Rev. Bd. 1990), *modified*, 6 FCC Rcd 1665 (1991).

Georgia, IS GRANTED and the application of Anthony Lamar Canup and George M. Pass d/b/a White County Broadcasting (File No. BPH-890427ME) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

STATEMENT OF BOARD MEMBER NORMAN B. BLUMENTHAL CONCURRING *DUBITANTE*

This case, like the vast majority of our recent comparative licensing proceedings, turns directly on the award of (ownership/management) integration credit, a comparative factor in some current disrepute with the judiciary, *see Bechtel v. FCC*, No. 91-1112 (D.C. Cir. Jan. 31, 1992), as well as the subject of very possible abandonment by the Commission in the near future. *See News Release*, Report No. DC 2072, GC Dkt. 92-52, released March 12, 1992.[1]

Here, my majority colleagues affirm the award of integration credit to Charles Smithgall, an 80(+)-year old "retiree," who nonetheless proposes to retain (1) his interest in a 5,500 acre nature preserve nearby the proposed station; and (2) his other residences and business offices in Atlanta, and Gainesville, Georgia.

For reasons more broadly explicated in my statement in *Kevin Potter*, 6 FCC Rcd 7278, 7281 (Rev. Bd. 1991)(concurring), and consistent with the court's dubiety in *Bechtel*, *see generally* slip op. at 13-14, I find that the instant award rests upon presumptions and speculations that provide yet another exemplum of something sorely amiss in our current paradigm.

Dissent, however, in the "unsettled" environment in which we here operate, would advance nothing, so I refrain.

FOOTNOTE TO STATEMENT

[1] I recognize that the *News Release* indicates that any alteration in our extant criteria will apply only to "all applicants not in hearing as of the effective date of the [final] action in this proceeding," which we must interpret to mean that integration shall remain a vital decisional factor in cases designated theretofore. *But see Order*, FCC 921-015, released March 16, 1992 (*Anchor Broadcasting Limited Partnership*), suggesting an antilogy, at least with respect to integration.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

JEAN-PIERRE SCIOVILLE,
Complainant,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,
Defendant.

File No. E-91-042

ORDER

Adopted: April 14, 1992; Released: April 21, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On January 17, 1991, Jean-Pierre Scioville (hereinafter "Scioville") filed the above-captioned formal complaint against The Chesapeake and Potomac Telephone Company (hereinafter "C&P") seeking damages for C&P's alleged violations of Section 201(b) and 202(a) of the Communications Act, 47 U.S.C. §§ 201(b), 202(a), by its alleged failure to protect pay telephones operated by Scioville from fraudulent calling. On April 8, 1992, however, Scioville and C&P filed a joint motion to dismiss the complaint with prejudice stating that the parties have agreed to a settlement that disposes of all issues in the complaint.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Jean-Pierre Scioville's and The Chesapeake and Potomac Telephone Company's Joint Motion to Dismiss IS GRANTED and that the above-captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LITEL TELECOMMUNICATIONS
CORPORATION
Complainant,

v.

NORTH PITTSBURGH TELEPHONE COMPANY
Defendant.

File No. E-92-34

ORDER

Adopted: April 14, 1992; Released: April 21, 1992

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On January 29, 1992, Litel Telecommunications Corporation (hereinafter "Litel") filed the above-captioned formal complaint against North Pittsburgh Telephone Company (hereinafter the "Defendant") seeking to recover damages from the Defendant for alleged violations of the Commission Rules in connection with Defendant's computation and assessment of terminating carrier common line ("CCL") charges. On March 27, 1992, Litel, with Defendant's authorization, filed a joint motion to dismiss the complaint which states that the parties have negotiated a mutually agreeable settlement of all pending controversies.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the request for dismissal of the above-captioned complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and that the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

City of Alice, Texas

Notice of Apparent Liability
for Forfeiture Penalty for
Station KUU317 in the Police
Radio Service, Private Land
Mobile Radio Services, at
Alice, Texas

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 17, 1992; Released: April 23, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against the City of Alice, Texas, a licensee in the Police Radio Service of the Commission's Private Land Mobile Radio Services, call sign KUU317. A monetary forfeiture penalty of $8,000 is set forth for an apparent willful and repeated violation of the Commission's rule relating to failure to notify the FAA regarding malfunctioning tower lights. 47 C.F.R. Sec. 17.48(a). *See also* 47 C.F.R. Sec. 17.25 and 17.47(a)(1).

2. The Commission's Kingsville, Texas Office inspected a radio antenna structure located in Alice, Texas, at latitude N-27-43-36, longitude W-098-05-10 on October 25, 27 and 28, 1991. The inspection disclosed that the top beacon was not operating. The inspection further revealed that as of October 28, 1991, the Federal Aviation Administration Flight Service Station had not been notified that the light was extinguished.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.25 of the Commission's Rules governs the lighting of the tower at issue. 47 C.F.R. Sec. 17.25. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Sec. 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA by Commission Rule Section 17.48(a). 47 C.F.R. Sec. 17.48(a). The City of Alice, therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing FAA notification regarding malfunctioning lights.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *Deregulation - Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934. 47 USC Section 503(b). Pursuant to our *Policy Statement, Standards for Assessing Forfeiture*, 6 FCC Rcd 4695 (1991), *recon. pending*, the base amount of a monetary forfeiture penalty for failure by a Private Land Mobile Radio Service licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that the City of Alice, Texas, IS APPARENTLY LIABLE FOR A FORFEITURE of Eight Thousand Dollars ($8,000) for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that the City of Alice, Texas, shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Any written response regarding why the forfeiture should be reduced or not imposed should be sent to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to the City of Alice, Texas, P.O. Drawer 3229, Alice, Texas 78333.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Central Power and Lighting Co.

Notice of Apparent Liability
for Forfeiture Penalty for
Stations KNFC295 and KKF880 in
the Private Land Mobile Radio
Services at Alice, Texas

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 17, 1992; Released: April 23, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against Central Power and Lighting Co., Corpus Christi, Texas. Central Power and Lighting Co. is a Commission Private Land Mobile Radio Services licensee of Radio Stations KNFC295 and KKF880 mounted on an antenna tower in Alice, Texas. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to failure to notify the FAA regarding malfunctioning tower lights. 47 C.F.R. Sec. 17.48(a). *See also* 47 C.F.R. Sec. 17.25 and 17.47(a)(1).

2. The Commission's Kingsville, Texas Office inspected a radio antenna structure for the above identified stations located near Central Power and Lighting Co. Service Center in Alice, Texas, at latitude N-27-44-50, longitude W-098-05-24, on November 3 and 5, 1991. The inspection disclosed that the top beacon was not operating. The inspection further revealed that as of the morning of November 5th the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Sec. 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Sec. 17.47(a)(1). Furthermore, Central Power and Lighting Co. failed to notify the FAA of the outage as required by Section 17.48(a) of the rules. 47 C.F.R. Sec. 17.48(a). Central Power and Lighting Co., therefore, appears to have willfully and repeatedly violated the Commission's rule prescribing FAA notification regarding malfunctioning lights.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *Deregulation - Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934. 47 USC Section 503(b). Pursuant to our *Policy Statement, Standards for Assessing Forfeiture*, 6 FCC Rcd 4695 (1991), *recon. pending*, the base amount of a monetary forfeiture penalty for failure by a Private Land Mobile Radio Service licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that Central Power and Lighting Co. IS APPARENTLY LIABLE FOR A FORFEITURE of Eight Thousand Dollars ($8,000) for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Central Power and Lighting Co. shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Any written response regarding why the forfeiture should be reduced or not imposed should be sent to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to Central Power and Lighting Co., Attn: Telecommunications, Box 2121, Corpus Christi, Texas 78403.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Jaeger, Inc.

Notice of Apparent Liability
for Forfeiture Penalty for
Station WAF989 in
the Private Land Mobile Radio
Services at Churchville, MD

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 17, 1992; Released: April 23, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against Jaeger, Inc., Aberdeen, Maryland, a licensee in the Commission's Private Land Mobile Radio Services, call sign WAF989. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Sec. 17.23 and 17.50), the lighting of radio antenna towers (47 C.F.R. Sec. 17.26) and notification to the FAA if tower lights malfunction (47 C.F.R. Sec. 17.48(a)). *See also* 47 C.F.R. Sec. 17.47(a)(1).

2. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29, on September 9 and 10, 1991. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Sec. 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Sec. 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Sec. 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sec. 17.23 and 17.50. Jaeger, Inc., therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing FAA notification regarding malfunctioning lights and the painting of towers.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *Deregulation - Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934, 47 USC Section 503(b). Pursuant to our *Policy Statement, Standards for Assessing Forfeiture*, 6 FCC Rcd 4695 (1991), *recon. pending*, the base amount of a monetary forfeiture penalty for failure by a Private Land Mobile licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that Jaeger, Inc. IS APPARENTLY LIABLE FOR A FORFEITURE of Eight Thousand Dollars ($8,000) for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Jaeger, Inc. shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Any written response regarding why the forfeiture should be reduced or not imposed should be sent to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to Jaeger, Inc., P.O. Box 220, 218 W. Bel Air Avenue, Aberdeen, Maryland.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Harry Fitzgerald

Notice of Apparent Liability
for Forfeiture Penalty for
Station WNVP271 in
the Private Land Mobile Radio
Services at Churchville, MD

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 17, 1992; Released: April 23, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against Harry Fitzgerald, Bourbonnais, Illinois, a licensee in the Commission's Private Land Mobile Radio Services, call sign WNVP271. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Sec. 17.23 and 17.50), the lighting of radio antenna towers (47 C.F.R. Sec. 17.26) and notification to the FAA if tower lights malfunction (47 C.F.R. Sec. 17.48(a)). *See also* 47 C.F.R. Sec. 17.47(a)(1).

2. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29, on September 9 and 10, 1991. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Sec. 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Sec. 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Sec. 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sec. 17.23 and 17.50. Harry Fitzgerald, therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing FAA notification regarding malfunctioning lights and the painting of towers.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *Deregulation - Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934, 47 USC Section 503(b). Pursuant to our *Policy Statement, Standards for Assessing Forfeiture*, 6 FCC Rcd 4695 (1991), *recon. pending*, the base amount of a monetary forfeiture penalty for failure by a Private Land Mobile licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that Harry Fitzgerald IS APPARENTLY LIABLE FOR A FORFEITURE of Eight Thousand Dollars ($8,000) for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Harry Fitzgerald shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Any written response regarding why the forfeiture should be reduced or not imposed should be sent to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to Harry Fitzgerald, P.O. Box 99, Bourbonnais, Illinois 60914.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Genstar Stone Products Company

Notice of Apparent Liability
for Forfeiture Penalty for
Station KNBT340 in
the Private Land Mobile Radio
Services at Churchville, MD

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 17, 1992; Released: April 23, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against Genstar Stone Products Company, Hunt Valley, Maryland, a licensee in the Commission's Private Land Mobile Radio Services, call sign KNBT340. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Sec. 17.23 and 17.50), the lighting of radio antenna towers (47 C.F.R. Sec. 17.26) and notification to the FAA if tower lights malfunction (47 C.F.R. Sec. 17.48(a)). *See also* 47 C.F.R. Sec. 17.47(a)(1).

2. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29, on September 9 and 10, 1991. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Sec. 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Sec. 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Sec. 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sec. 17.23 and 17.50. Genstar Stone Products Company, therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing FAA notification regarding malfunctioning lights and the painting of towers.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *Deregulation-Land Mobile Radio*, 69 FCC 2d 1612, 1617 n.3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934, 47 USC Section 503(b). Pursuant to our *Policy Statement, Standards for Assessing Forfeiture*, 6 FCC Rcd 4695 (1991), *recon. pending*, the base amount of a monetary forfeiture penalty for failure by a Private Land Mobile licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that Genstar Stone Products Company IS APPARENTLY LIABLE FOR A FORFEITURE of Eight Thousand Dollars ($8,000) for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Genstar Stone Products Company shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Any written response regarding why the forfeiture should be reduced or not imposed should be sent to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to Genstar Stone Products Company, Executive Plaza IV, Hunt Valley, Maryland 21031.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Harford Sands, Inc.

Notice of Apparent Liability
for Forfeiture Penalty for
Station KKO811 in
the Private Land Mobile Radio
Services at Churchville, MD

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 17, 1992; Released: April 23, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against Harford Sands, Inc., Joppa, Maryland, a licensee in the Commission's Private Land Mobile Radio Services, call sign KKO811. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Sec. 17.23 and 17.50), the lighting of radio antenna towers (47 C.F.R. Sec. 17.26) and notification to the FAA if tower lights malfunction (47 C.F.R. Sec. 17.48(a)). *See also* 47 C.F.R. Sec. 17.47(a)(1).

2. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29, on September 9 and 10, 1991. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Sec. 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Sec. 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Sec. 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sec. 17.23 and 17.50. Harford Sands, Inc., therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing FAA notification regarding malfunctioning lights and the painting of towers.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *Deregulation - Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934, 47 USC Section 503(b). Pursuant to our *Policy Statement, Standards for Assessing Forfeiture*, 6 FCC Rcd 4695 (1991), *recon. pending*, the base amount of a monetary forfeiture penalty for failure by a Private Land Mobile licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that Harford Sands, Inc. IS APPARENTLY LIABLE FOR A FORFEITURE of Eight Thousand Dollars ($8,000) for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Harford Sands, Inc. shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Any written response regarding why the forfeiture should be reduced or not imposed should be sent to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to Harford Sands, Inc., Post Office Box 210, 40 Ft. Hoyle Road, Joppa, Maryland 21085.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

McGlothlin & Benham Electric
Company, Inc.

Notice of Apparent Liability
for Forfeiture Penalty for
Station WRH838 in
the Private Land Mobile Radio
Services at Churchville, MD

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 17, 1992; Released: April 23, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against McGlothlin & Benham Electric Company, Inc., Rising Sun, Maryland, a licensee in the Commission's Private Land Mobile Radio Services, call sign WRH838. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Sec. 17.23 and 17.50), the lighting of radio antenna towers (47 C.F.R. Sec. 17.26) and notification to the FAA if tower lights malfunction (47 C.F.R. Sec. 17.48(a)). *See also* 47 C.F.R. Sec. 17.47(a)(1).

2. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29, on September 9 and 10, 1991. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Sec. 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Sec. 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Sec. 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sec. 17.23 and 17.50. McGlothlin & Benham Electric Company, Inc., therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing FAA notification regarding malfunctioning lights and the painting of towers.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *Deregulation-Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934. 47 USC Section 503(b). Pursuant to our *Policy Statement, Standards for Assessing Forfeiture*, 6 FCC Rcd 4695 (1991), *recon. pending*, the base amount of a monetary forfeiture penalty for failure by a Private Land Mobile licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that McGlothlin & Benham Electric Company, Inc. IS APPARENTLY LIABLE FOR A FORFEITURE of Eight Thousand Dollars ($8,000) for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that McGlothlin & Benham Electric Company, Inc. shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Any written response regarding why the forfeiture should be reduced or not imposed should be sent to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to McGlothlin & Benham Electric Company, Inc., 221 E. Main Street, Rising Sun, Maryland 21911.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

McGuire Refrigeration, Inc.

Notice of Apparent Liability
for Forfeiture Penalty for
Station WZL675 in
the Private Land Mobile Radio
Services at Churchville, MD

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 17, 1992; Released: April 23, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against McGuire Refrigeration, Inc., Edgewood, Maryland, a licensee in the Commission's Private Land Mobile Radio Services, call sign WZL675. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Sec. 17.23 and 17.50), the lighting of radio antenna towers (47 C.F.R. Sec. 17.26) and notification to the FAA if tower lights malfunction (47 C.F.R. Sec. 17.48(a)). *See also* 47 C.F.R. Sec. 17.47(a)(1).

2. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29, on September 9 and 10, 1991. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Sec. 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Sec. 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Sec. 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sec. 17.23 and 17.50. McGuire Refrigeration, Inc., therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing FAA notification regarding malfunctioning lights and the painting of towers.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *Deregulation - Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934, 47 USC Section 503(b). Pursuant to our *Policy Statement, Standards for Assessing Forfeiture*, 6 FCC Rcd 4695 (1991), *recon. pending*, the base amount of a monetary forfeiture penalty for failure by a Private Land Mobile licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that McGuire Refrigeration, Inc. IS APPARENTLY LIABLE FOR A FORFEITURE of Eight Thousand Dollars ($8,000) for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that McGuire Refrigeration, Inc. shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Any written response regarding why the forfeiture should be reduced or not imposed should be sent to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to McGuire Refrigeration, Inc., 2809 Pulaski Highway, Edgewood, Maryland 21040.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Corun & Gatch, Inc.

Notice of Apparent Liability
for Forfeiture Penalty for
Station WYH606 in
the Private Land Mobile Radio
Services at Churchville, MD

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 17, 1992; Released: April 23, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against Corun & Gatch, Inc., Fallston, Maryland, a licensee in the Commission's Private Land Mobile Radio Services, call sign WYH606. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Sec. 17.23 and 17.50), the lighting of radio antenna towers (47 C.F.R. Sec. 17.26) and notification to the FAA if tower lights malfunction (47 C.F.R. Sec. 17.48(a)). *See also* 47 C.F.R. Sec. 17.47(a)(1).

2. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29, on September 9 and 10, 1991. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Sec. 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Sec. 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Sec. 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sec. 17.23 and 17.50. Corun & Gatch, Inc., therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing FAA notification regarding malfunctioning lights and the painting of towers.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *Deregulation - Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934, 47 USC Section 503(b). Pursuant to our *Policy Statement, Standards for Assessing Forfeiture*, 6 FCC Rcd 4695 (1991), *recon. pending*, the base amount of a monetary forfeiture penalty for failure by a Private Land Mobile licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that Corun & Gatch, Inc. IS APPARENTLY LIABLE FOR A FORFEITURE of Eight Thousand Dollars ($8,000) for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Corun & Gatch, Inc. shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Any written response regarding why the forfeiture should be reduced or not imposed should be sent to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to Corun & Gatch, Inc., 1900 Bel Air Road, Fallston, Maryland 21047.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

RUSSELL-ROWE COMMUNICATIONS, INC. CSR-3564

Petition for Special Relief

MEMORANDUM OPINION AND ORDER

Adopted: April 15, 1992; Released: April 23, 1992

By the Chief, Video Services Division:

1. On May 9, 1991, Russell-Rowe Communications, Inc., licensee of Television Broadcast Station WGXA (ABC, Channel 24), Macon, Georgia, filed a special relief petition with the Commission seeking either to remove Station WSB-TV (ABC, Channel 2), Atlanta, Georgia, from the Commission's list of significantly viewed television signals in Bibb County, Georgia, where Macon is located, or to waive §§76.92(f) and 76.156 of the Commission's Rules to enable WGXA and other television stations licensed to Macon to assert network nonduplication and syndicated program exclusivity rights against WSB-TV in Bibb County. Multimedia WMAZ-TV, Inc., licensee of Station WMAZ-TV (CBS, Channel 13), Macon, Georgia, filed "Comments in Support of Petition for Special Relief" on July 22, 1991, and Georgia Television Company, licensee of Station WSB-TV, filed an "Opposition to Petition for Special Relief" on August 9, 1991. On August 26, 1991, WGXA filed an answer to WSB-TV's Opposition, and WSB-TV filed a "Petition for Leave to File Supplemental Comments" on September 10, 1991.

2. According to WGXA, neither Macon nor Bibb County is within WSB-TV's predicted service contours, and WSB-TV's share of noncable viewing in 1989 and in 1990 for Bibb County was only one percent, whereas §76.5(i) of the Commission's Rules requires that network affiliates must attain at least a 25-percent net weekly circulation, as well as a three-percent share of viewing hours, to be considered significantly viewed.[1] WGXA adds that it did not begin operations until April 21, 1982, and that since then viewers in Macon and in Bibb County have stopped depending upon distant large market VHF stations such as WSB-TV for off-the-air service. WGXA adds that WSB-TV had been on the air for 23 years in 1971, when the data for the Commission's original list of significantly viewed signals was first compiled, and that during most of that time VHF stations, such as WSB-TV, had a considerable advantage over competing UHF station, because many of the television tuners in use then lacked reception capacity for UHF signals comparable to that for VHF signals. Moreover, WGXA states that the cable system serving Macon and Bibb County is owned by Cox Cable Middle Georgia, Inc., which in turn, is owned by Cox Enterprises, Inc., which also owns WSB-TV. Finally, WGXA states that it is controlled by Black Americans, and it notes that of the 1,104 commercial broadcast stations in the United States in 1990, only 18 were Black-owned. Ten of these were not on the air in 1971, when the Commission's original list of significantly viewed signals was compiled. WGXA contends, therefore, that since more than half of all Black-owned television stations were excluded from this list, they are seriously disadvantaged when competing with nonminority stations, because they cannot obtain cable carriage of their network programming, pursuant to §76.92(f) of the Rules, and they are unable to get cable carriage of their syndicated programming, pursuant to §76.156 of the Rules.

3. In response, WSB-TV states that the Commission has specifically established after a lengthy proceeding a standard for evaluating changes in viewership as a basis for waiver of the significantly viewed exception to the network nonduplication rule in its decision on remand in *KCST-TV, Inc.*, 103 FCC 2d 407, 413 (1986). In order to obtain a waiver of this provision, or presumably of the significantly viewed exception to the syndicated exclusivity rules, WSB-TV maintains that pursuant to *KCST* a station challenging another station's continued significantly viewed status must do so based on data specific either to the system or to the community involved.[2] WSB-TV notes that WGXA's attempt to manipulate county-wide Nielsen data into a community-specific showing for Macon is premised upon "arbitrary assumptions concerning the level of cable penetration," particularly in view of the fact that this same Nielsen data purportedly shows that cable networks attained a one percent audience share in noncable households.

4. WSB-TV adds that, according to Nielsen's 1990 data, Bibb County now has a cable penetration rate of 78 percent, which makes any county-wide noncable viewing data there inherently suspect. WSB-TV also notes that since 1975, the audience share for all networks nationwide during prime time has dropped from 93 percent to 64 percent, so that one may assume that no affiliate today has the same audience share that it had in 1971.[3] However, WSB-TV emphasizes that the Commission has consistently maintained from the beginning ". . . that it would not delete stations included on the original list." Any such deletion, WSB-TV notes, would not only result in an increase in compulsory copyright fees for local cable systems, but it might also seriously disrupt the established habits of viewers who have been depending upon WSB-TV's carriage to receive both syndicated and network programming at times that differ from broadcasts by WGXA and WMAZ-TV. In support of this, WSB-TV cites a recent survey conducted by Cox Cable which indicated that over 82 percent of its subscribers watch WSB-TV either occasionally or frequently, according to the station. WSB-TV argues that there is no reason for the Commission to intervene into the marketplace to alter the natural competitive balance in order that a particular owner may realize a larger profit, particularly when WSB-TV has already contracted for syndicated programs expecting that they would not be deleted in Bibb County, and conversely, WGXA has bargained for programs with no expectation that it would have exclusive rights against WSB-TV.

5. In addition, WSB-TV notes that at least 425 commercial television stations have commenced operations since the first significantly viewed list was adopted (which included seven Black-owned stations, as well as five other minority-owned stations). Of these 425 stations, approximately three percent are minority-owned; therefore, the vast majority of new stations not included in the original

1971 data were not minority-owned, and some of these newer stations, including KXLI-TV (Channel 41), St. Cloud, Minnesota, a Blacked-owned station, have since secured significantly viewed status in various counties by virtue of the Commission's special relief process.

6. In its answer to WSB-TV's opposition, WGXA emphasizes that it is not attempting to remove WSB-TV from the local cable system, it is merely seeking the same benefits currently enjoyed by the other network affiliates licensed to Macon, which have program exclusivity protection because the Altanta NBC and CBS affiliates were not significantly viewed in 1971 in Macon, Georgia.[4] WGXA adds that WSB-TV's transmitter is located about 80 miles from Macon, and that local viewers overwhelmingly prefer their Macon affiliates now. In addition, WGXA notes that WSB-TV does not cover local news in Macon, has no operational facilities there, and does not depend, even partially, upon the Macon market for any of its $70 million in annual revenue. By comparison, WGXA notes that all of its $3 million annual revenue comes from the Macon Television Market. Finally, WGXA states that the cable system serving Macon is quite profitable and can easily absorb a slight increase in programming costs, due to increased copyright payments for continued carriage of WSB-TV, or it can drop WSB-TV, as it already has done with an ABC affiliate from Columbus.

7. In response to WGXA's contention that Bibb County television viewers prefer to watch local Macon network television affiliates, Station WSB-TV points out that in 1971 both itself and Station WMGT, a local "UHF" Macon television station, were NBC affiliates. Despite being in direct competition, both stations were included in the Commission's original list of significantly viewed signals in Bibb County. This, WSB-TV claims, demonstrates that Macon viewers have not historically watched local stations to the exclusion of more distant ones, given a choice, even off-the-air.

8. We find that neither the statistical analysis nor the other arguments presented by WGXA justify waiver of the rules in this case. With respect to WGXA's contention that the only reason WSB-TV is significantly viewed in Bibb County is that there was no local competition, we note that at the time WSB-TV was added to the Commission's original county-wide significantly viewed list for Bibb County, Georgia, it was in direct competition with Station WMGT (NBC), Macon, Georgia. Furthermore, the issue here is not why or how WSB-TV captured the audience share in 1971 necessary to achieve significantly viewed status, but rather whether or not it retains such audience share today. With respect to this issue, WGXA has failed to carry the high burden of pleading necessary to obtain a waiver. As we previously noted in our decision in *KCST, Inc., supra*, petitioners seeking a waiver of the program exclusivity rules based on allegations that another station no longer is significantly viewed are expected ". . . to make such a demonstration utilizing community- or system-specific data to one standard error, and will be expected to show that the station in question has not met our standards for significant viewing for two consecutive years." This requirement is uniform for all petitioners, regardless of when the stations involved commenced broadcasting, and regardless of the minority status of the stations' licensees. WGXA has not even attempted such a community or system showing, and Dr. Norwood's analysis based upon a manipulation of county-wide data does not present alternative grounds for waiver since certain critical assumptions it makes are not substantiated.[5] Furthermore, according to Commission records, the cable system serving Bibb County had a penetration rate of just under 75 percent and the cable system serving Macon had a penetration rate just over 56 percent when they filed their FCC Forms 325, Schedules 1 in July 1989, but even if their present penetration rates have grown to 78 percent, as indicated by WSB-TV, there still would be sufficient noncable homes there with which to conduct a statistically valid survey of off-air viewing. In fact, we note that when the data was collected for the Commission's original list in 1971, the only counties intentionally omitted were either those which had over 90-percent cable penetration, or those for which fewer than five noncable diaries were tabulated. *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 378 (1972). Consequently, Station WGXA is not foreclosed from following the waiver procedure set out in *KSCT, supra*, due to high cable penetration.[6]

9. In view of the foregoing, we find that grant of the above petition is not in the public interest.

10. Accordingly, IT IS ORDERED, pursuant to §0.283 of the Commission's Rules, that the request for waiver of the Commission's program exclusivity rules filed May 9, 1991, by Russell-Rowe Communications, Inc., (CSR-3564) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau

FOOTNOTES

[1] WGXA supports this assertion with a statistical analysis prepared by Dr. Gerald L. Norwood, a mathematics professor at Mercer University, which is premised upon the large proportion of Bibb County's population which resides in Macon and the small amount of noncable viewing of WSB-TV in Bibb County. Given his assumptions, Dr. Norwood calculates WSB-TV's share of noncable viewing in Macon to be 1.1 percent in 1987, 0.7 percent in 1988, 1.3 percent in 1989, and 1.1 in 1990.

[2] Although WSB-TV recognizes that the Commission accepted a showing in *KCST* which did not fully comport with its future requirements, WSB-TV notes the unique geographic circumstances present in *KCST*, which are not present in the instant case, which included a vast, rugged county and the City's location in the county at a point farthest away from the station involved.

[3] WSB-TV suggests that the Commission's present standard for significant viewing of a three-percent share and a 25-percent net weekly circulation for network stations should be modified now in view of the various viewing choices available to the public, including premium services, superstations, VCR's, and home satellite dishes.

[4] Contrary to WGXA's contention, WSB-TV, formerly an NBC affiliate, was found to be significantly viewed in Bibb County and thus in Macon, Georgia, in 1971.

[5] Dr. Norwood's assumptions allow no means to compute a standard error. Furthermore assumptions concerning the location of noncable homes within Bibb County, the cable penetra-

tion in Macon, and the the amount of viewing of WSB-TV in Macon are not substantiated by the available facts. According to the *Television and Cable Factbook*, the cable system serving Macon also serves Bibb County, Houston, Jones County, Peach County, Bonaire, Byron, Centerville, Lake Wildwood, Robins AFB, and Warner Robbins, which may or may not match the cable system utilized in Dr. Norwood's analysis. Furthermore, Dr. Norwood's assumption that all the non-TV homes in Bibb County are located in Macon conflicts with the national average of 98 percent of all homes being TV homes and also with the estimate by the Standard Rate and Data Service that 77 percent of all Bibb County homes are in Macon and, therefore, that 77 percent of the non-TV homes in Bibb County would also be in Macon. Thus, without additional information, the accuracy of Dr. Norwood's estimates is not established.

[6] Finally, we note that the independent ratings services (*i.e.*, Arbitron or Nielsen) can provide special tabulations of the diaries from their county coverage data bases at minimal cost. Based on available information, Commission staff estimates that a retabulation of county coverage data for this case would cost less than $2000. Specifically, Arbitron indicates that it charges between $5 and $10 per diary to retabulate diaries from specific zip codes (such as those within the service area of a certain community or cable system), plus a service fee of approximately $100. Since there were 85 noncable diaries for Bibb County during the most recent 1991 County Coverage Survey, even if all of these diaries were in fact from Macon, the retabulation charge should only be $850 plus $100 for one sweep period, and twice that amount for the two periods mandated by our prior decision in *KCST*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-487

In re Applications of

GOODLETTSVILLE BROADCASTING COMPANY, INC.	File No. BPH-861215MI
SAR BROADCASTING, INC.	File No. BPH-861216MB
BLEDSOE COMMUNICATIONS, LTD.	File No. BPH-861216MD
HEIDELBERG-STONE BROADCASTING COMPANY	File No. BPH-861217MA
GOODLETTSVILLE COMMUNITY BROADCASTING, INC.	File No. BPH-861217MM
WILLIAM E. BENNS, III	File No. BPH-861217MQ
TENNESSEE WOMEN IN BROADCASTING, INC.	File No. BPH-861217MT
RICHARD S. FRANCIS	File No. BPH-861217NA

For Construction Permit for a
New FM Station on Channel 246C2
in Goodlettsville, Tennessee

Appearances

Harry C. Martin, Matthew H. McCormick, and *Troy F. Tanner*, on behalf of Goodlettsville Broadcasting Company, Inc.; *Stanley G. Emert, Jr.* on behalf of SAR Broadcasting, Inc.; *C. Michael Norton* and *David C. Andrew* on behalf of Bledsoe Communications, Ltd.; *Timothy K. Brady*, on behalf of Heidelberg-Stone Broadcasting Company; *Richard J. Hayes, Jr.*, on behalf of Goodlettsville Community Broadcasting, Inc.; *Lauren A. Colby* and *Deborah S. Colby*, on behalf of William E. Benns, III; *Richard J. Bodorff* and *Jonathan W. Emord*, on behalf of Tennessee Women in Broadcasting, Inc.; *Jeffrey S. Southmayd* and *Stephen C. Simpson*, on behalf of Richard S. Francis; and *Gary Schonman*, on behalf of the Chief, Mass Media Bureau.

SUPPLEMENTAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: April 16, 1992; Released: April 23, 1992

PRELIMINARY STATEMENT

1. The Initial Decision in this case granted the application of D.G. Enterprises, Inc. (DG). *Goodlettsville Broadcasting Company, Inc.*, FCC 90D-31, released July 5, 1990. Thereafter, the Review Board remanded the proceeding for further hearings and the preparation of a supplemental initial decision on certain issues relating to the applications of DG and Lindsey Christian Broadcasting Company (LCBC). *Memorandum Opinion and Order*, FCC 92R-20, released March 11, 1992. By *Order*, FCC 92M-371, released March 25, 1992, the Presiding Judge granted DG's motion for voluntary dismissal of its application. Subsequently, by *Order*, FCC 92M-467, released April 16, 1992, the Presiding Judge granted LCBC's motion to dismiss its application. The dismissal of DG's and LCBC's applications mooted the remanded issues. Also, the dismissal of DG's application requires the selection of another applicant to receive the Goodlettsville construction permit.

FINDINGS OF FACT

2. The findings of fact set out in the Initial Decision remain unchanged and are incorporated herein by reference.

CONCLUSIONS

3. Although the findings are unchanged, there has been a significant legal development since the release of the Initial Decision. In *Jerome Thomas Lamprecht* v. *FCC*, No. 88-1395 (D.C. Cir. Feb. 19, 1992), the court held that the Commission's policy of awarding credit for female ownership in comparative hearings violates the Fifth Amendment. The Commission has not appealed the court's decision and, accordingly, female ownership and participation is no longer a factor worthy of credit under the comparative issue. Also, in *Ronald Sorenson*, 6 FCC Rcd 1952, 1952-1953 (1991), the Commission ruled that civic activities are to be considered with local residence as a unified comparative factor to determine which applicant has the greater likelihood of knowledge of an interest in the community. *See* also *Rebecca L. Boedker*, 6 FCC Rcd 2557 (1991). These developments have been taken into account in evaluating the remaining applicants.

4. The Initial Decision awarded SAR Broadcasting, Inc., Bledsoe Communications, Ltd. and Tennessee Women In Broadcasting significantly less than 100% quantitative integration credit. Also, Tennessee Women In Broadcasting, Inc. received a substantial diversification demerit. Neither *Lamprecht* or *Sorenson* affect the Presiding Judge's conclusion that these three applicants have the weakest showings. Similarly, there is no basis for altering the conclusion that William E. Benns, III (Benns) and Goodlettsville Community Broadcasting, Inc. (GCBI) have inferior qualitative attributes when measured against those of the remaining applicants. Benns has no present area residence or civic activities. Also, Benns has received a moderate diversification demerit. GCBI is also comparatively inferior since aside from broadcast experience, its enhancement consists only of Fred Anderson's area residence[1] since 1988 and his proposal to move to Goodlettsville in the event of a grant.

5. The remaining three applicants are Richard S. Francis (Francis), Goodlettsville Broadcasting Company, Inc. (GBC) and Heidelberg-Stone Broadcasting Company (Heidelberg-Stone). Francis has been a resident of the service

area for six years but offers no civic participation. Francis does not claim credit for broadcast experience or other enhancement.

6. GCBI's five integrated principals each holds a 20% interest. *Eleanor Mead* has lived in the service area for approximately 16 years including residence in Goodlettsville since 1985. Mead's participation in civic activities is considerable. However, its impact is lessened by the fact that most of these activities, particularly ones in which she held a leadership position, took place in 1988 or later years. *Carolyn Jackson* is a long time resident of the service area. However, her civic activities are minimal. *Dorothy L. Sheppard* is also a long time resident of the service area including residence in Goodlettsville from 1968 to 1977. Her civic involvement is also minimal, consisting solely of her activities with the Goodlettsville Women's Club from approximately 1970 to 1974. Sheppard held no office in the organization. *Donna H. Smith* is also a long term resident of the service area. Her record of civic activities is more extensive than that of the other principals. *Whitson Adamson* has lived in the service area since 1976. Adamson's record of civic activities consists of his serving as a volunteer media representative on committees of various civic organizations over a period of 15 years and as a volunteer teacher at two colleges. Adamson also has broadcast experience.

7. Heidelberg-Stone is a general partnership of John H. Heidelberg (51%) and Katherine A. Stone (49%). Heidelberg has resided in the service area since 1968 including his current residence in Goodlettsville since February 1987. Heidelberg has participated in various civic activities between 1973 and 1986. Heidelberg has broadcast experience and is Black. Stone has resided within the service area since July 1985. Stone has regularly performed as a singer, on a voluntary basis, for various civic and community organizations. Her civic activities also involved coaching a team in which her son participated and acting as a volunteer disc jockey at an elementary school.

8. Of the three remaining applicants considered for the grant, Francis is the weakest and is ranked third. Of the two remaining applicants, Heidelberg-Stone possesses the strongest qualitative attributes and its application will be granted. Although all of GCBI's stockholders possess long-term local residence as compared to Heidelberg-Stone (51% long term, 49% short term) the advantage is tempered by the unimpressive record of civic activities of most of GCBI's principals. Heidelberg-Stone's advantage under the minority criterion (51% to 0) outweighs the slight edge enjoyed by GCBI under the local residence and civic participation unified comparative factor and justifies the grant of Heidelberg-Stone application.

Accordingly, IT IS ORDERED, That unless an appeal from this Supplemental Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[2] the application of Heidelberg-Stone Broadcasting Company for a construction permit for a new FM station on Channel 246C2 in Goodlettsville, Tennessee IS GRANTED; and the applications of Goodlettsville Broadcasting Company, Inc., SAR Broadcasting, Inc., Bledsoe Communications, Ltd., Goodlettsville Community Broadcasting, Inc., William E. Benns, III, Tennessee Women In Broadcasting, Inc., and Richard S. Francis ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] Anderson is sole stockholder of GCBI.

[2] In the event exceptions are not filed within 30 days after the release of this Supplemental Initial Decision, and the Commission does not review the case on its own motion, this Supplemental Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Basic Services, Inc.

Notice of Apparent Liability
for Forfeiture Penalty for
Station WNMH724 in
the Private Land Mobile
Service at Churchville, MD

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 17, 1992; Released: April 20, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against Basic Services, Inc., a licensee in the Commission's Private Land Mobile Radio Service, call sign WNMH724. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Sec. 17.23 and 17.50), the lighting of radio antenna towers (47 C.F.R. Sec. 17.26) and notification to the FAA if tower lights malfunction (47 C.F.R. Sec. 17.48(a)). *See also* 47 C.F.R. Sec. 17.47(a)(1).

2. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29, on September 9 and 10, 1991. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Sec. 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to insure that the lights are functioning properly. 47 C.F.R. Sec. 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Sec. 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sec. 17.23 and 17.50. Basic Services, Inc., therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing FAA notification regarding malfunctioning lights and the painting of towers.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *Deregulation - Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934. 47 USC Section 503(b). Pursuant to our *Policy Statement, Standards for Assessing Forfeiture*, 6 FCC Rcd 4695 (1991), *recon. pending*, the base amount of a monetary forfeiture penalty for failure by a Private Land Mobile licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that Basic Services, Inc., IS APPARENTLY LIABLE FOR A FORFEITURE of Eight Thousand Dollars ($8,000) for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Basic Services, Inc., shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

If you wish to file a written response regarding why the forfeiture should be reduced or not be imposed, please send it to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to Basic Services, Inc., 1610 Ruffs Mill Rd., Bel Air, MD 21014.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

William Suit

Notice of Apparent Liability
for Forfeiture Penalty for
Station WNRD921 in
the Private Land Mobile
Service at Churchville, MD

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 17, 1992; Released: April 20, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against William Suit, a licensee in the Commission's Private Land Mobile Radio Service, call sign WNRD921. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Sec. 17.23 and 17.50), the lighting of radio antenna towers (47 C.F.R. Sec. 17.26) and notification to the FAA if tower lights malfunction (47 C.F.R. Sec. 17.48(a)). *See also* 47 C.F.R. Sec. 17.47(a)(1).

2. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29 on September 9 and 10, 1991. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Sec. 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Sec. 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Sec. 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sec. 17.23 and 17.50. William Suit, therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing FAA notification regarding malfunctioning lights and the painting of towers.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *Deregulation - Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934, 47 USC Section 503(b). Pursuant to our *Policy Statement, Standards for Assessing Forfeiture*, 6 FCC Rcd 4695 (1991), *recon. pending*, the base amount of a monetary forfeiture penalty for failure by a Private Land Mobile licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that William Suit is APPARENTLY LIABLE FOR A FORFEITURE of Eight Thousand Dollars ($8,000) for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that William Suit shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

If you wish to file a written response regarding why the forfeiture should be reduced or not be imposed, please send it to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to William Suit, 2811 Emmoitan Rd., Abingdon, MD 21009.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Ronald Davis

Notice of Apparent Liability
for Forfeiture Penalty for
Station WNRD624 in
the Private Land Mobile
Service at Churchville, MD

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 17, 1992; Released: April 20, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against Ronald Davis, a licensee in the Commission's Private Land Mobile Radio Service, call sign WNRD624. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Sec. 17.23 and 17.50), the lighting of radio antenna towers (47 C.F.R. Sec. 17.26) and notification to the FAA if tower lights malfunction (47 C.F.R. Sec. 17.48(a)). *See also* 47 C.F.R. Sec. 17.47(a)(1).

2. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29 on September 9 and 10, 1991. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Sec. 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Sec. 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Sec. 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sec. 17.23 and 17.50. Ronald Davis, therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing FAA notification regarding malfunctioning lights and the painting of towers.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *Deregulation Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934, 47 USC Section 503(b). Pursuant to our *Policy Statement, Standards for Assessing Forfeiture*, 6 FCC Rcd 4695 (1991), *recon. pending*, the base amount of a monetary forfeiture penalty for failure by a Private Land Mobile licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that Ronald Davis IS APPARENTLY LIABLE FOR A FORFEITURE of Eight Thousand Dollars ($8,000) for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Ronald Davis shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

If you wish to file a written response regarding why the forfeiture should be reduced or not be imposed, please send it to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to Ronald Davis, 427 Stepney Rd., Aberdeen, MD 21001.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Astro Sheet Metal, Inc.

Notice of Apparent Liability
for Forfeiture Penalty for
Station WNNZ360 in
the Private Land Mobile
Service at Churchville, MD

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 17, 1992; Released: April 20, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against Astro Sheet Metal, Inc., a licensee in the Commission's Private Land Mobile Radio Service, call sign WNNZ360. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Sec. 17.23 and 17.50), the lighting of radio antenna towers (47 C.F.R. Sec. 17.26) and notification to the FAA if tower lights malfunction (47 C.F.R. Sec. 17.48(a)). *See also* 47 C.F.R. Sec. 17.47(a)(1).

2. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29 on September 9 and 10, 1991. The inspections disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspections further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Sec. 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to insure that the lights are functioning properly. 47 C.F.R. Sec. 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Sec. 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sec. 17.23 and 17.50. Astro Sheet Metal, Inc., therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing FAA notification regarding malfunctioning lights and the painting of towers.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *Deregulation - Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934, 47 USC Section 503(b). Pursuant to our *Policy Statement, Standards for Assessing Forfeiture*, 6 FCC Rcd 4695 (1991), *recon. pending*, the base amount of a monetary forfeiture penalty for failure by a Private Land Mobile licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that Astro Sheet Metal, Inc., IS APPARENTLY LIABLE FOR A FORFEITURE of Eight Thousand Dollars ($8,000) for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Astro Sheet Metal, Inc., shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed.

8. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

If you wish to file a written response regarding why the forfeiture should be reduced or not be imposed, please send it to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

9. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to Astro Sheet Metal, Inc., 2700 N. Point Rd., Baltimore, MD 21222.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

GBC Contractors, Inc.

Notice of Apparent Liability
for Forfeiture Penalty for
Station WNQB750 in
the Private Land Mobile
Service at Churchville, MD

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 17, 1992; Released: April 20, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against GBC Contractors, Inc., a licensee in the Commission's Private Land Mobile Radio Service, call sign WNQB750. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Sec. 17.23 and 17.50), the lighting of radio antenna towers (47 C.F.R. Sec. 17.26) and notification to the FAA if tower lights malfunction (47 C.F.R. Sec. 17.48(a)). *See also* 47 C.F.R. Sec. 17.47(a)(1).

2. The Commission's Baltimore, Maryland Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29 on September 9 and 10, 1991. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Sec. 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to insure that the lights are functioning properly. 47 C.F.R. Sec. 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Sec. 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sec. 17.23 and 17.50. GBC Contractors Inc., therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing FAA notification regarding malfunctioning lights and the painting of towers.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *Deregulation Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934, 47 USC Section 503(b). Pursuant to our *Policy Statement, Standards for Assessing Forfeiture*, 6 FCC Rcd 4695 (1991), *recon. pending*, the base amount of a monetary forfeiture penalty for failure by a Private Land Mobile licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that GBC Contractors, Inc., IS APPARENTLY LIABLE FOR A FORFEITURE of Eight Thousand Dollars ($8,000) for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that GBC Contractors, Inc., shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed.

8. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

A written response regarding why the forfeiture should be reduced or not be imposed should be sent to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

9. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to GBC Contractors, Inc., P.O. Box 35253, Richmond, VA 23235.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Geof L. Bowser
Kirkland, WA

Unlicensed Operation and
Misuse of a Safety Frequency
in the Maritime
Mobile Radio Service

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 17, 1992; Released: April 23, 1992

1. On September 5, 1991, at 7:52 p.m. PST, an FCC electronics technician monitored a vessel identified as "SUND" transmitting on marine channel 70, 156.525 MHz, a marine safety channel reserved for digital selective calling (DSC) use. Based on the identification transmitted by Bowser, the FCC inspector reviewed Commission records and found no license issued to the operator, Geof L. Bowser. The State of Washington shows a commercial fishing license issued to Bowser for the vessel SUND, #WN779M. Their records also list Geof L. Bowser as the registered owner.

2. On September 9, 1991, an FCC electronics technician called and spoke to Geof Bowser. He admitted that he did not have a radio station license and that he had assumed that the previous owner's license was automatically transferred to him.

3. Section 301 of the Communications Act provides in relevant part:

> No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act (footnote omitted).

Similarly, Section 81.13 of the Commission's rules states:

> All stations in the maritime services must be licensed by the FCC.

Any operation of the "SUND" radio station without a license was unauthorized and in violation of Section 301 of the Communications Act and Section 80.13(a) of the Commission's rules. Consequently, it is determined that an apparent violation of Section 301 of the Communications Act and Section 80.13(a) of the Commission's rules has occurred for operating a facility without an instrument of authorization. In addition, the operation on marine channel 70, 156.525 MHz, was in violation of Section 80.359(b) of the Commission's rules since that channel is reserved for Digital Selective Calling (DSC).

4. Section 503(b) of the Communications Act states in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have --
>
> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter . . . shall be liable to the United States for a forfeiture penalty.

5. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*, the base forfeiture amount for operation of a private radio station without an instrument of authorization for the service is $8,000. There appear to be no factors which would warrant adjustment of the amount.

6. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b) and Section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, IT IS ORDERED that Geof L. Bowser IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of $8,000 for the willful violation of the above cited statutory and rule provisions. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended, and the Commission's *Policy Statement* cited above.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(a)(3) of the Commission's rules, 47 C.F.R. §1.80(f)(3), that Geof L. Bowser shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed.

8. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

If you wish to file a written response regarding why the forfeiture should be reduced or not be imposed, please send it to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

9. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to Geof L. Bowser, 11006 NE 68th, #809, Kirkland, WA 98033.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Aquatic Technical Services, Inc.

Notice of Apparent Liability for
Forfeiture Penalty for WHW856
in the Private Coast Radio Service
Eastsound, WA

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 17, 1992; Released: April 23, 1992

By the Commission:

1. On August 11, 1991, personnel at the Commission's Ferndale, Washington Office observed Private Coast Radio Station, WHW856, transmitting an analog-type frequency-modulated emission on 156.525 MHz.

2. Radio station WHW856, by the terms of its license, is not authorized to use the 156.525 MHz frequency. That safety frequency is limited to Digital Selective Calling (DSC) use.

3. Section 301 of the Communications Act of 1934, as amended, provides in part:

> No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio--except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

Any operation on 156.525 MHz by radio station WHW856 exceeded the terms of its license and therefore violated Section 301 of the Communications Act.

4. Section 503(b) of the Communications Act states in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have --
>
> (B) Willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter--shall be liable to the United States for a forfeiture penalty.

We find that Aquatic willfully violated Section 301 of the Act through radio transmissions on the frequency 156.525 MHz on August 11, 1991.

5. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*, the base forfeiture amount for transmitting on an unauthorized frequency is $5,000.00. There appear to be no factors which warrant adjustment of the amount.

6. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47, U.S.C. Sec 503(b) and Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, IT IS ORDERED that Aquatic Technical Services, Inc., IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of $5,000 for willful violation of Section 301 of the Act on August 11, 1991. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

7. IT IS FURTHER ORDERED pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. 1.80(f)(3), that Aquatic, shall within 30 days of the release date of this Notice pay the full amount of the forfeiture or file a written statement showing why the forfeiture should be reduced or not imposed.

8. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Send any written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

9. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to Aquatic Technical Services, Inc., Box 565, N. Beach Road, Eastsound, WA 98245.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Harkins & Company

Notice of Apparent Liability
for Forfeiture Penalty for
Station KKJ318 in
the Private Land Mobile
Petroleum Radio Service
at Ben Bolt, TX

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 20, 1992; Released: April 23, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against Harkins & Company (Harkins), a licensee in the Commission's Private Land Mobile Petroleum Radio Service, call sign KKJ318. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the lighting of radio antenna structures. 47 C.F.R. Sections 17.27, 17.48(a).

2. The Commission's Kingsville, Texas Office inspected a radio antenna structure located near Ben Bolt, Texas, at latitude N-27-39-04, longitude W-098-02-30 on August 18 and 19, 1991. The inspection disclosed that the middle beacon and a sidelight located three-fourths of the way up the antenna were not operating. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the lights were extinguished. The Commission's records show that Harkins & Company is licensed to operate a radio transmitter from that antenna structure.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.27 of the Commission's rules sets forth requirements for the lighting of antenna structures within a certain height range. The tower here at issue fell within that range, but was not fully lighted so as to be in compliance with section 17.27. *See* 47 C.F.R. Section 17.27. In addition, section 17.48(a) of the rules requires a licensee to notify the Federal Aviation Administration where tower lights function improperly or are extinguished, which Harkins failed to do. *See* 47 C.F.R. Section 17.48(a). Harkins, therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing the lighting of the tower and requiring that the FAA be notified if lights malfunction.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *See Deregulation - Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934, 47 USC Section 503(b). Pursuant to our *Policy Statement in the Matter of Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*, the base amount of a monetary forfeiture penalty for failure by a private land mobile licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that Harkins & Company is APPARENTLY LIABLE FOR A FORFEITURE of Eight Thousand Dollars ($8,000) for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Harkins & Company shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

If you wish to file a written response regarding why the forfeiture should be reduced or not be imposed, please send it to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to Harkins & Company, P.O. Box 1490, Alice, Texas 78332.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

David Plourde
Lewiston, Maine

NOTICE OF APPARENT LIABILITY

Adopted: March 20, 1992; Released: April 24, 1992

By the Commission:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), to David Plourde for willful violation of Section 301 of the Communications Act, 47 U.S.C. § 301. On October 9, 1991, Mr. Plourde operated a CB Radio Station on 27.215 MHz using a non-type-accepted transmitter and a linear amplifier. Use of non-type-accepted transmitting apparatus voided Mr. Plourde's authorization to operate a CB station. 47 C.F.R. §§ 95.404 and 95.409(a).

2. The appropriate amount of forfeiture for this violation is $10,000.

II. BACKGROUND

3. On October 9, 1991, in response to complaints of interference, the Commission's Field Operation Bureau (FOB) monitored transmissions from Mr. Plourde's station on 27.215 MHz from 5:18 PM to 5:30 PM EST. After they had monitored the station the FOB inspected it and determined from equipment configuration and the admission of Mr. Plourde that he had operated a Kenwood TS-940SD 200 watt hf Amateur type transceiver. A Dentron 160-10L hf linear power amplifier was attached to the transceiver. Both the transmitter and linear amplifier are not type-accepted for use in the CB Service.

4. Mr. Plourde has been the subject of complaints of 12 persons in four cases handled by the FOB since moving to his present address. There is a history of complaints concerning Mr. Plourde's CB operation at his previous address. Mr. Plourdes has not been cooperative in addressing these complaints.

III. DISCUSSION

5. Mr. Plourde has clearly violated Section 301 of the Communications Act. Section 95.404 of the Commission Rules, enacted pursuant to Section 307(e) of the Communications Act specifies that an individual license is not required to operate a CB station. Section 95.409(a) of the Rules specifies, however, that "Use of a transmitter which is not FCC type-accepted voids your authority to operate the station."

6. The violation on October 9, 1991, is clearly willful.

7. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Record 4695 (1991), *recon. pending*, the base forfeiture amount would be $8,000.

8. Pursuant to the *Policy Statement*, it is appropriate to increase the amount of forfeiture when the conduct is intentional. In light of the history of complaints, it appears that Mr. Plourde's violation was intentional. We, therefore, increase the amount to $10,000.

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that David Plourde IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of $10,000 for operating an unlicensed station in violation of Section 301 of the Communications Act and Section 95.409(a) of the Commission's Rules. The amount specified was determined after consideration of the factors set forth in Section 503(b) of the Communications Act.

10. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. § 1.80(f)(3), that David Plourde shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

Send written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: NAL response
Room 744
1919 M Street, NW
Washington, D.C. 20554

11. IT IS FURTHER ORDERED that the Secretary shall send, by registered mail, a copy of this Notice of Apparent Liability for Monetary Forfeiture to David Plourde, 3 Orange Street, Lewiston, Maine 04240.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Donald W. Bishop
Overland Park, Kansas

NOTICE OF APPARENT LIABILITY

Adopted: March 20, 1992; Released: April 24, 1992

By the Commission:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), to Donald W. Bishop for willful violation of Section 301 of the Communications Act, 47 U.S.C. § 301. On October 6, 1991, Mr. Bishop operated a radio station on 7420 kHz, 7417.9 kHz, and 15050.2 kHz without any authorization from the Commission to do so.

2. The appropriate amount of forfeiture for this violation is $10,000.

II. BACKGROUND

3. On October 6, 1991, the Commission's long range, High Frequency, radio Direction-Finding Network (HFDF) detected an unauthorized transmission on the frequencies 7420 kHz, 7417.9 kHz, and 15050.2 kHz between 8:24 AM and 8:28 PM EST. The HFDF determined that the source of the transmissions was mobile as they tracked it across the midwestern U.S. The vehicle transmitting was intercepted and inspected near Limon, Colorado, by Commission staff. Mr. Bishop admitted the violations at that time.

4. Mr. Bishop is a contributor or editor of several land mobile trade publications and has written several articles on the problems of unlicensed operation. He is also aware of the problem of "Pirate Radio" activity wherein individuals engage in unlicensed operation as a hobby. His operation was typical of "Pirate Radio" operations in frequency choice and content.

III. DISCUSSION

5. Mr. Bishop has clearly violated Section 301 of the Communications Act.

6. The violation on October 6, 1991, is clearly willful.

7. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Record 4695 (1991), *recon. pending*, the base forfeiture amount would be $8,000. It is consistent with the *Policy Statement* that the amount of forfeiture be increased to $10,000 due to the intentional nature of Mr. Bishop's violation.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that Donald W. Bishop IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of $10,000 for operating an unlicensed station in violation of Section 301 of the Communications Act. The amount specified was determined after consideration of the factors set forth in Section 503(b) of the Communications Act.

9. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. § 1.80(f)(3), that Donald W. Bishop shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

Send written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: NAL response
Room 744
1919 M Street, NW
Washington, D.C. 20554

10. IT IS FURTHER ORDERED that the Secretary shall send, by registered mail, a copy of this Notice of Apparent Liability for Monetary Forfeiture to Donald W. Bishop, P.O. Box 4075, Overland Park, Kansas 66204-0075.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Profit Enterprises, Inc.
Monrovia, California.

NOTICE OF APPARENT LIABILITY

Adopted: March 20, 1992; Released: April 24, 1992

By the Commission:

I. INTROUDCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, ("the Act"), 47 U.S.C. § 503(b), to Profit Enterprises, Inc., ("Profit") for willful violation of Section 2.803 of the Commission's Rules, 47 C.F.R. § 2.803. On June 21, 1991, Profit sold Class B personal computers for which no equipment authorization had been granted. See 47 C.F.R. §§ 15.3(s) and 15.101(a). Further, the label on the computers contained an FCC ID number which was not valid.

2. The appropriate amount of forfeiture for this violation is $10,000.

II. BACKGROUND

3. Profit is a distributor of personal computers. Personal computers are defined to be Class B digital devices under Part 15 of the Commission's Rules. Personal computers must receive Commission certification before they may be offered for sale. 47 C.F.R. §§ 2.803 & 15.101(a). *See also* 47 U.S.C. § 302(b).

4. On June 21, 1991, Profit sold three 286-16 MHz personal computers to W. D. Sales, Inc., of Beaverton, Oregon. This is evidenced by Profit's sales invoice number 91-18932. The label on the computers indicated "FCC ID FNZ421-AT01." This was not a valid FCC ID number.

III. DISCUSSION

5. Profit has violated Section 302(b) of the Communications Act and Section 2.803 of the Rules.

6. The violation is willful. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Record 4695 (1991), *recon. pending*, the base forfeiture amount for marketing unauthorized equipment is $7,000 for each violation.

7. Due to the fact that Profit used an invalid FCC ID, the violation was apparently intentional. Accordingly, consistent with the *Policy Statement*, the forfeiture amount will be increased to $10,000 for the violation.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. §1.80, that Profit Enterprises, Inc., IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of $10,000 for marketing uncertified personal computers in violation of Section 302(b) of the Communications Act and Section 2.803 of the Commission's Rules. The amount specified was determined after consideration of the factors set forth in Section 503(b) of the Communications Act.

9. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. § 1.80(f)(3), that Profit Enterprises, Inc., shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

Send written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: NAL response
Room 744
1919 M Street, NW
Washington, D.C. 20554

10. IT IS FURTHER ORDERED that the Secretary shall send by registered mail a copy of this Notice of Apparent Liability for Monetary Forfeiture to Profit Enterprises, Inc., 2650 South Myrtle Avenue #B3, Monrovia, California 91016.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Minneapolis SMSA Limited Partnership — File No. 03365-CL-MP-89

For Authority to modify facilities for Station KNKA 219 in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B in the Minneapolis/ St. Paul MSA

MEMORANDUM OPINION AND ORDER

Adopted: April 10, 1992; Released: April 20, 1992

By the Deputy Bureau Chief, Common Carrier Bureau:

I. INTRODUCTION

1. We address here the Petition for Reconsideration (petition), filed by McCaw Cellular Communications, Inc. (McCaw), which contests the grant of the captioned application by the Mobile Services Division (MSD). For the reasons discussed below, we grant the petition and vacate the grant.

II. BACKGROUND

2. Minneapolis SMSA Limited Partnership (Minneapolis LP), the wireline licensee for the Minneapolis/St. Paul MSA, received its initial construction authorization on June 6, 1983.[1] On June 6, 1989, Minneapolis LP filed the captioned application to increase power at an existing cell site.[2] The application was listed as accepted for filing on Public Notice, Report No. CL-89-215 (released July 18, 1989). The MSD granted the application on September 8, 1989.[3] On October 11, 1989, McCaw, the non-wireline licensee in the Minneapolis MSA, filed its petition. On October 25, 1989, US West NewVector Group, Inc. (New Vector), the general partner in Minneapolis LP, filed an opposition, and McCaw replied.

3. Minneapolis LP's application states that the proposed increase in power is needed to provide better service within the Minneapolis MSA. In addition, the application proposes the use of an omnidirectional, downtilted antenna. The application also shows that the proposed modification results in an expansion of the Cellular Geographic Service Area (CGSA). The application was deemed an application for a change in the authorized CGSA pursuant to Section 22.903(d) of the rules.[4] *See* Public Notice, Report No. CL-89-215 (released July 18, 1989).

III. DISCUSSION

4. McCaw asserts that Minneapolis LP filed the subject application for the expansion of the authorized CGSA a year after the five year "fill-in" period for the wireline authorization expired.[5] McCaw contends that Minneapolis LP's application is premature and inconsistent with the directive of the Bureau's *April Order*, which precluded licensees from filing such applications, because it was filed prior to a Commission notice specifying when applications for unserved areas could be filed. *April Order*, 4 FCC Rcd at 3636. McCaw adds that its applications to expand its CGSAs in several MSAs, which were filed after the expiration of its five year "fill-in" period, were dismissed.

5. NewVector explains that the increase in power proposed in its application is to strengthen the signal within the existing cell service area for improved service to a highway and two population centers. NewVector states that for technical reasons it cannot achieve these service objectives without an expansion of the CGSA. It further submits that the increase in area is only 11.5 square miles and that it would be difficult, if not impossible, for an applicant to propose service for this specific area of the MSA without causing interference to the existing system.[6] NewVector contends that the grant of the application is in the public interest and should stand in spite of the freeze of the *April Order* on applications for unserved areas. NewVector argues that the grant will not compromise the purpose of the *April Order* to retain the status quo for potential applicants pending the outcome of the Unserved Areas proceeding.

6. We agree with McCaw that the Minneapolis LP application was filed in contravention of the Bureau's *April Order*. NewVector concedes that the application proposes an expansion of the authorized CGSA. The *April Order* prohibited any change that would result in an expansion of a CGSA, until the Commission could adopt filing procedures and application requirements for all applicants seeking to provide service to unserved areas beyond authorized CGSA boundaries after the expiration of the five year fill-in period for licensees. *See supra* note 5. NewVector's contentions with regard to service and engineering in an effort to minimize the area of extension do not demonstrate a public interest that overrides the objective of the *April Order*. Accordingly, we find that the grant of the application by the MSD was in error.

IV. ORDERING CLAUSE

7. Accordingly, IT IS ORDERED that the Petition for Reconsideration, filed by McCaw Cellular Communications, Inc., October 11, 1989, IS GRANTED.

8. IT IS FURTHER ORDERED that the GRANT of the application of Minneapolis SMSA Limited Partnership, File No. 03365-CL-MP-89, by the Mobile Services Division IS VACATED and the application IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Bureau Chief,
Common Carrier Bureau

FOOTNOTES

[1] *See Advanced Mobile Phone Service, Inc. et.al.*, Mimeo No. 4567 (Com. Car. Bur. 1983).

[2] Minneapolis LP filed a Form 489 for the cell site on October 24, 1988.

[3] *See* Public Notice, Report No. CL-89-262 (released September 8, 1989).

[4] Section 22.903(d) provides, in pertinent part, that "[a]n applicant whose proposal would extend any 39 dBu contour . . . outside its presently authorized CGSA will be deemed to be apply for a change in its CGSA." *See* 47 C.F.R. §22.903(d).

[5] Section 22.31(a)(1)(i) of the rules allows MSA licensees to expand their systems free from competing applications for a "fill-in" period of five years from the construction authorization grant date. *See* 47 C.F.R. §22.31(a)(1)(i). The Common Carrier Bureau (Bureau) dismissed as premature applications that were filed for unserved areas outside authorized CGSAs within MSAs after the "fill-in" period expired. *Cellular Applications for Unserved Areas in MSAs / NECMAs*, 4 FCC Rcd 3636 (Com. Car. Bur., April 10, 1989) (*April Order*), *aff'd, First Report and Order and Memorandum Opinion and Order on Reconsideration (First Report and Order)* in CC Docket 85-388 and 90-6, FCC 91-306, 6 FCC Rcd 6185 (1991); *petition for review pending sub nom, Amery Telephone Company & Baldwin Telecom, Inc. v. FCC*, No. 89-1524 (D.C. Cir., filed Sept. 1, 1989). The Bureau stated that, upon expiration of this "fill-in" period, it would not allow licensees to file applications to expand CGSAs until the Commission announced that it would accept them. *April Order*, 4 FCC Rcd at 3636; *see Amendment of Part 22 of the Commission's Rules to provide for filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules (Notice)*, 5 FCC Rcd 1044 (1990), 55 Fed. Reg. 4882 (1990) (Unserved Areas proceeding); *First Report and Order*, 6 FCC Rcd at 6185.

[6] Affidavit of Timothy R. Wong, engineer for NewVector, October 25, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-89

In the Matter of

Amendment of Section 73.202(b), RM-7964
Table of Allotments,
FM Broadcast Stations.
(Fosston, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 8, 1992; Released: April 22, 1992

Comment Date: June 12, 1992
Reply Comment Date: June 29, 1992

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Pine to Prairie Broadcasting, Inc. ("petitioner"), requesting the substitution of Channel 296C2 for Channel 296A at Fosston, Minnesota.[1] Petitioner also requests modifiction of its license for Station KKCQ-FM, Channel 296A, to specify operation on Channel 296C2.

2. We believe petitioner's proposal warrants consideration. Channel 296C2 can be allotted to Fosston, Minnesota, consistent with the Commission's spacing requirements 10 kilometers (6.2 miles) northeast of the community.[2] Since Fosston is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be requested for this allotment. We shall also propose to modify petitioner's license for Station KKCQ-FM to specify operation on Channel 296C2 in lieu of Channel 296A. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in the use of the higher powered channel at Fosston or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested party.

3. In view of the above, the Commission believes it is in the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Fosston, Minnesota	296A	296C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 12, 1992,** and reply comments on or before **June 29, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Eugene T. Smith
715 G Street, S. E.
Washington, D. C. 20003

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

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[1] The assignment of the license for Station KKCQ-FM from North Country Radio, Inc., to Pine to Prairie Broadcasting, Inc., was granted on January 16, 1992, and consummated on February 1, 1992. *See* File No. BALH-911127EC. Station KKCQ-FM was authorized to operate on Channel 296C3 in MM Docket 89-277. However, North Country Radio, Inc. was unable to upgrade the facilities due to the poor health of its president and has continued to operate on Channel 296A.

[2] The coordinates for Channel 296C2 are 47-37-46 and 95-38-02.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-617

In the Matter of

Amendment of Section 73.202(b), RM-7564
Table of Allotments,
FM Broadcast Stations.
(Tahlequah, Oklahoma)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 9, 1992; Released: April 22, 1992

By the Acting Chief, Allocations Branch:

1. At the request of Demaree Communications, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 7600 (1990), proposing the substitution of Channel 269C3 for Channel 269A at Tahlequah, Oklahoma, and the modification of Station KEOK(FM)'s license to specify operation on the higher class channel. Comments were filed by the petitioner reiterating its intention to apply for the channel, if allotted, and by Whitman Broadcasting Corp. ("Whitman"), permittee of Station KISK(FM), Lowell, Arkansas.[1] Reply comments were filed by the petitioner.

2. Whitman does not object to the allotment of Channel 269C3 to Tahlequah but does take issue with the Commission's proposed reference coordinates. Whitman recognizes that the proposed coordinates for Channel 269C3 at Tahlequah comply with the spacing requirements set forth in Section 73.207 with respect to the outstanding construction permits of Stations KISK(FM) at Lowell and KBIX-FM at Wagoner, Oklahoma. However, as recognized by the Commission's staff, the final licensing of Station KEOK(FM) may be withheld pending the licensing of the Lowell and Wagoner stations because the Tahlequah reference coordinates are short-spaced to the Lowell and Wagoner reference coordinates. To avoid this conflict, Whitman suggests that Channel 269C3 be allotted to Tahlequah at coordinates approximately 20 kilometers south of the community.

3. Petitioner objects to the consideration of Whitman's comments because it did not receive the comments until the day after the close of the comment period and thus are late-filed.[2] However, should they be considered, it argues that specifying new reference coordinates for Tahlequah would delay initiation of the expanded service by Station KEOK(FM) because it would limit the available site area. Petitioner argues that this would not serve the public interest since the substantially larger community of Tahlequah presently receives local transmission service only from Station KTLQ-AM and Class A FM Station KEOK(FM) while Lowell is already well-served by stations licensed to the nearby communities of Rogers, Fayetteville and Springdale, Arkansas.

4. We have reviewed the pleadings before us and find that the public interest would be served by substituting Channel 269C3 for Channel 269A at Tahlequah since it would provide the community with a wide coverage area FM service as well as enable Station KEOK(FM) to expand its service area. As proposed, we will also modify petitioner's license for Station KEOK(FM) to specify operation on the higher class channel. We do not believe that it is essential to specify allotment coordinates for Channel 269C3 at Tahlequah which comply with the spacing requirements to the Lowell Channel 270C2 reference coordinates. Because a construction permit has been issued for Station KISK and the Tahlequah allotment would not be short-spaced to the permit, we believe that there is no public benefit in delaying resolution of this proceeding until a license has been issued to Station KISK. *See Whiting, Wisconsin, et al.*, 6 FCC Rcd 2624 (1991). However, because final licensing of Station KEOK(FM) could be delayed pending the licensing of Station KISK, the staff has identified new reference coordinates which obviate the short-spacing.[3] While the petitioner has objected to the specification of new reference cordinates, it has not provided any showing which demonstrates that suitable sites are unavailable. Therefore, since the use of new reference coordinates will eliminate one of the two contingencies which may lead to a delay in the final licensing of an upgraded service at Tahlequah, we believe the public interest is served by specifying the new coordinates.[4]

5. Channel 269C3 can be allotted to Tahlequah in compliance with the Commission's minimum distance separation requirements with a site restriction of 18.1 kilometers (11.3 miles) south to avoid short-spacings to the proposed reallotment of Channel 268C3 from Nowata to Collinsville, Oklahoma (MM Docket 91-255), Station KISK, Channel 270C2, Lowell, Arkansas, as well as the Lowell reference coordinates, and to Station KBIX-FM,

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[1] After the record closed, Whitman filed supplemental comments. In its supplemental comments, Whitman withdraws its opposition to the allotment at Tahlequah except for that portion which seeks to have the Tahlequah allotment protect not only Station KISK(FM)'s construction permit coordinates but also the Lowell reference coordinates. Therefore, we will only discuss this one remaining issue.

[2] Whitman's comments were not late-filed. Commission Rule 1.47 states that service shall be made on or before the day on which the document is filed and that service by mail is complete upon mailing. Therefore, since the comments were mailed to petitioner the day before the close of the comment period, they are timely filed.

[3] Based on the staff's review of the new coordinates, we find that the permissible site area encompasses 8.25 square kilometers (3.2 square miles) and believe that no line-of-sight or terrain obstruction problems are present.

[4] We note that the permittee of Station KBIX-FM at Wagoner has not raised any objection to the allotment of the Tahlequah

Channel 271A, Wagoner, Oklahoma.[5] Because use of this site restriction does not negate the short-spacing to the reference coordinates for Channel 271A at Wagoner, final licensing of Station KEOK(FM) on Channel 269C3 may be contingent upon the licensing of Station KBIX-FM.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 5, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Tahlequah, Oklahoma	269C3

7. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Demaree Communications, Inc., for Station KEOK(FM), Tahlequah, Oklahoma, IS MODIFIED to specify operation on Channel 269C3, in lieu of Channel 269A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Demaree Communications, Inc., licensee of Station KEOK(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

channel as proposed in the *Notice*.

[5] The coordinates for Channel 269C3 at Tahlequah are North Latitude 35-45-16 and West Longitude 95-00-30. The site specified in the *Notice* reflected a site restriction of 15.4 kilometers (9.6 miles) south (35-46-56; 94-59-15).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-298

In the Matter of

Amendment of Section 73.202(b), RM-7803
Table of Allotments,
FM Broadcast Stations.
(Lake George, New York)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 9, 1992; Released: April 22, 1992

By the Acting Chief, Allocations Branch:

1. At the request of William H. Walker, III ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 5800 (1991), proposing the allotment of Channel 253A to Lake George, New York, as the community's first local FM service. Petitioner filed comments reiterating his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 253A to Lake George since an interest has been expressed in providing the community with its first local FM service. Channel 253A can be allotted to the community in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] In light of the fact that the allotment, although short-spaced to Station CIEL-FM, Channel 253C1, Longueuille, Quebec, Ontario, at both its licensed and proposed antenna sites, will not cause any prohibited interference, the Canadian government has concurred in the allotment as a specially negotiated channel allotment.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 5, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Lake George, New York	253A

4. The window period for filing applications will open on **June 8, 1992,** and close on **July 8, 1992.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 253A at Lake George are North Latitude 43-25-42 and West Longitude 73-42-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-73

In the Matter of

Amendment of Section 73.202(b),	*RM-4961*, RM-5615,
Table of Allotments	RM-5286, RM-5980,
FM Broadcast Stations	RM-5291, RM-5981,
(*Benton*, Clarksville, *Dardanelle*,	*RM-5314*, RM-5982,
El Dorado, Hampton, Harrison,	*RM-5339*, RM-5983,
Huntsville, *Mena*, Ozark and	RM-5381, RM-5984,
Sherwood, Arkansas; Homer,	RM-5411, RM-5985,
Louisiana; *Sallisaw* and *Vinita*,	*RM-5421*, *RM-5986*,
Oklahoma; *Hooks* and *Kilgore*,	RM-5508
Texas)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: April 9, 1992; Released: April 22, 1992

By the Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration filed by Central Arkansas Broadcasting, Inc. ("Central Arkansas"), former licensee of Station KWKK, Channel 272A, Dardanelle, Arkansas, and a Petition for Reconsideration filed by Texarkana Broadcasting, Inc. ("Texarkana"), licensee of Station KLLI, Channel 240A, Hooks, Texas, both directed to the *Report and Order* in this proceeding, 3 FCC Rcd 4840 (1988).[1] [2] Noalmark Broadcasting Corporation, licensee of Station KKTX, Channel 240A, Kilgore, Texas, filed an Opposition directed against the Texarkana Petition for Reconsideration. For the reasons discussed below, we deny both Petitions for Reconsideration.[3]

Background

2. The *Notice of Proposed Rule Making* in this proceeding, 2 FCC Rcd 1963 (1987), set forth eleven mutually exclusive petitions for rule making. Three of those petitions proposed new allotments and eight petitions proposed upgrades of existing allotments. Included among the petitions for rule making proposing upgrades was a proposal by Bridges Broadcasting Service, licensee of Station KAKI, Channel 296A, Benton, Arkansas. That petition proposed the substitution of Channel 294C2 for Channel 296A at Benton, and modification of the Station KAKI license to specify operation on Channel 294C2. In response to the *Notice*, Central Arkansas filed a counterproposal proposing the substitution of Channel 294C1 for Channel 272A at Dardanelle and the modification of its license accordingly. In a separate context, the *Notice* proposed the substitution of Channel 241C2 for Channel 240A at Hooks, Texas, which conflicted with both a proposed substitution of Channel 241C2 for Channel 240A for Station KKTX at Kilgore, Texas, and a proposed Channel 242C1 allotment at Mena, Arkansas.

3. In accordance with normal procedures, we were able to eliminate some of the conflicts by allotting alternate channels. However, in regard to the conflicting upgrade proposals at Benton and Dardanelle, we were unable to resolve this conflict by allotting an alternate channel. Similarly, we were also unable to resolve the conflicting proposals at Hooks, Kilgore and Mena. Therefore, these conflicting sets of proposals were comparatively considered under the guidelines set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). The priorities are as follows:

1) first full-time aural service

2) second full-time aural service

3) first local service

4) other public interest matters

(co-equal weight given to priorities 2 and 3)

Benton and Dardanelle, Arkansas

4. In the *Report and Order*, we granted the upgrade at Benton in accordance with priority 4. We noted that the Benton upgrade would provide a new reception service to approximately 419,438 persons, whereas the Dardanelle upgrade would have provided a new reception service to approximately 117,489 persons. Under priority 4, this population difference was determinative. In regard to the Benton upgrade, we recognized that a minimum of five aural services were available to the 419,438 persons receiving the new service. By comparison, the upgrade at Dardanelle would have provided a third aural service to 2,508 persons, a fourth aural service to 13,742 persons, and a fifth aural service to 8,092 persons. In view of the significant difference in the respective populations, we determined

[1] Public notice of the filing of the Petitions for Reconsideration was given on October 19, 1988 (Report No. 1753).

[2] Station KWKK is now licensed to James F. Dowden, Trustee-in-Bankruptcy (BALH-911021EJ).

[3] A third Petition for Reconsideration in this proceeding was filed by El Dorado Broadcasting Company (formerly Lowery Broadcasting Company), licensee of Station KLBQ, Channel 257A, El Dorado, Arkansas. That Petition for Reconsideration was directed against the action in the *Report and Order* denying its proposed substitution of Channel 258C2 for Channel 257A at El Dorado, and modification of the Station KLBQ license to specify operation on Channel 258C2. In the *Third Report and Order* in MM Docket No. 84-231, 7 FCC Rcd 470 (1992), the Commission granted an El Dorado Broadcasting Company upgrade proposal to the extent of upgrading Station KLBQ to specify operation on Channel 254C3. Inasmuch as El Dorado Broadcasting Company has stated a willingness to accept a Channel 254C3 upgrade in lieu of the Channel 258C2 upgrade, we are dismissing its Petition for Reconsideration.

that favoring the Dardanelle proposal solely on the number of reception services available to some of the persons within the reception gain area was unwarranted.

5. In support of its Petition for Reconsideration, Central Arkansas again refers to the fact that its proposed upgrade would provide either a third, fourth, or fifth aural service to approximately 24,342 persons. In view of the fact that this area is "underserved" and "comparatively isolated," Central Arkansas argues that its proposed upgrade at Dardanelle should have been preferred. By contrast, Central Arkansas also notes that of the 419,438 persons within the Benton 1 mV/m gain area, 340,613 of these persons reside in Pulaski County which receives 28 aural services. The remaining 78,825 persons receive at least five aural services.

6. After careful consideration of this matter, we affirm our earlier action upgrading Station KAKI, Benton, Arkansas, to specify operation on Channel 294C2. We emphasize that the Benton proposal will serve a significantly greater number of persons within its 1 mV/m gain area (419,438 compared to 117,489). This is a significant preference under priority 4. The fact that the Dardanelle upgrade would have provided either a third, fourth, or fifth aural service to 24,342 persons does not sufficiently mitigate the fact that the Benton upgrade will serve over 300,000 more persons. *Cf. Simon Geller*, 90 FCC 2d 250, 268-69, 276 (1982). As noted by Central Arkansas, in situations involving the allotment of new Class A channels to competing communities, we have considered the fact that one of the communities is relatively isolated and receives fewer services. *Sanibel, Florida*, 52 RR 2d 571 (1982); *La Grange, Indiana*, 50 RR 2d 1235 (1982). These cases are distinguishable because they involved the allotment of new Class A channels to competing communities of comparable populations. Given that their populations were of similar size, the more isolated community with fewer services was favored. In view of the significant difference in population that will receive service from the proposed Benton upgrade, however, we would not be warranted in deciding this case on the basis of fewer available aural services or the fact that Dardanelle is the more isolated community.

Hooks and Kilgore, Texas, and Mena, Arkansas

7. The *Report and Order* denied Texarkana's proposed substitution of Channel 241C2 for Channel 241A at Hooks, and modification of the Station KLLI license to specify operation on Channel 241C2. We determined that a mutually exclusive proposal to allot Channel 241C1 allotment at Mena, Arkansas as that community's second local FM transmission service should be preferred. In addition, we noted that the denial of the Hooks upgrade enabled us to also grant the proposed Channel 241C2 upgrade for Station KKTX at Kilgore, Texas.

8. In its Petition for Reconsideration, Texarkana argues that the *Report and Order* is not in accord with Section 307(b) of the Communications Act which requires a fair, efficient and equitable distribution of radio service among the states and communities. In support of this argument, Texarkana notes that Station KLLI is the only station licensed to Hooks, while Mena already has two stations and two stations are licensed to Kilgore.

9. We deny the Petition for Reconsideration. In this proceeding, the proposed upgrade at Hooks was denied due to the conflict with the proposed new allotment at Mena. The proposals were comparatively considered under priority 4 of the FM allotment criteria as set forth in *Revision of FM Assignment Policies and Procedures, supra*. As we noted in the *Report and Order* in this proceeding, *Andalusia, Alabama*, 49 Fed. Reg. 32201, published August 13, 1984, states our policy that a modification of a license to a superior channel does not provide as great a public interest benefit as that of a new primary service. *See also Queensbury, New York*, 5 FCC Rcd 3243 (1990). Indeed, the *Notice of Proposed Rule Making* in this proceeding advised proponents for channel upgrades in conflict with proposals for new allotments that they should demonstrate a preference under the allotment criteria by providing a showing of need for proposed increases in existing services. Texarkana has not demonstrated such need with regard to its proposal for Hooks. The fact that Station KLLI is the only station licensed to Hooks does not constitute a preference for denying a new allotment in order to grant an upgrade. Therefore, its proposal was correctly denied. We note as an additional consideration that denial of the Hooks upgrade enabled us to grant both a new service to Mena *and* an upgrade at Kilgore, Texas.

10. As a final matter, we note that the Commission specifically stated that the Table of Allotments and the means of allotting these channels to the Table are intended to enable the Commission to meet its obligation under Section 307(b) of the Act. *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d at 89, 90. Texarkana has not shown that we have departed from these guidelines.

11. Accordingly, IT IS ORDERED, That the aforementioned Petition for Reconsideration filed by Central Arkansas Broadcasting, Inc. IS DENIED.

12. IT IS FURTHER ORDERED, That the aforementioned Petition for Reconsideration filed by Texarkana Broadcasting, Inc. IS DENIED.

13. IT IS FURTHER ORDERED, That the aforementioned Petition for Reconsideration filed by El Dorado Broadcasting Company IS DISMISSED.

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

15. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),	**MM Docket No. 87-455**
Table of Allotments,	RM-5899
FM Broadcast Stations.	RM-6223
(Perry, Cross City, Holiday, Avon	RM-6224
Park, Sarasota and Live Oak,	RM-6225
Florida; Thomasville, Georgia)	RM-6226

In the Matter of

Amendment of Section 73.202(b),	**MM Docket No. 87-486**
Table of Allotments,	RM-5938
FM Broadcast Stations.	RM-6242
(Tallahassee, Quincy and	RM-6278
Crawfordsville, Florida;	
Bainbridge, Georgia)	

MEMORANDUM OPINION AND ORDER

Adopted: April 10, 1992; Released: April 22, 1992

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it three Petitions for Reconsideration directed to the *Report and Order* in this proceeding.[1] 4 FCC Rcd 5599 (1989). Specifically, the Petitions for Reconsideration were filed by Pasco Pinellas Broadcasting Company ("Pasco"), licensee of Station WLVU, Channel 292A, Holiday, Florida; Gator Broadcasting Corporation ("Gator"), licensee of Station WGGG, Channel 249A, Micanopy, Florida; and Sarasota FM, Inc. ("SFM"), licensee of Station WSRZ, Channel 292A, Sarasota, Florida. SFM filed an Opposition to the Pasco Petition for Reconsideration. Pasco filed a Reply to the SFM Opposition and a Supplement to its Petition for Reconsideration. SFM filed a Motion to Strike the Pasco Supplement. SFM and Gator filed a Motion for Leave to Supplement Petition for Reconsideration and a Supplement to Petition for Rule Making.[2] For the reasons discussed below, we are dismissing the Petition for Reconsideration filed by Gator, denying the Petition for Reconsideration filed by SFM, and granting the Petition for Reconsideration filed by Pasco.

Background

2. This proceeding began with the filing of two separate Petitions for Rule Making. The first Petition for Rule Making was filed by Rahu Broadcasting, Inc., proposing the allotment of Channel 295A to Perry, Florida, as that community's second local FM service. The second Petition for Rule Making was filed by Dolcom Broadcasting, Inc. ("Dolcom"), licensee of Station WTHZ, Channel 276A, Tallahassee, Florida, proposing the substitution of Channel 276C2 for Channel 276A at Tallahassee, and modification of the Station WTHZ license to specify operation on Channel 276C2. In order to accommodate the Channel 276C2 upgrade at Tallahassee, Dolcom also proposed the substitution of Channel 298A for vacant but applied for Channel 274A at Quincy, Florida. We issued a separate *Notice of Proposed Rule Making* for each proposal. In MM Docket No. 87-455, we proposed the allotment of Channel 295A to Perry, Florida. 2 FCC Rcd 6537 (1987). In MM Docket No. 87-486, we proposed the Channel 276C2 upgrade for Station WTHZ at Tallahassee, Florida, along with the Channel 298A for Channel 274A substitution at Quincy, Florida. 2 FCC Rcd 6801 (1987).

3. In response to the *Notice* in MM Docket No. 87-455 involving Perry, Florida, we received four counterproposals. The first counterproposal was jointly filed by Pasco and Women in Florida Broadcasting, Inc. ("Pasco"), licensee of Station WDFL, Channel 292A, Cross City, Florida, proposing the allotment of Channel 228A in lieu of Channel 295A at Perry, Florida. The Channel 228A allotment at Perry would also accommodate a proposed substitution of Channel 295C1 for Channel 292A at Cross City, and modification of the Station WDFL license to specify operation on Channel 295C1; and a proposed substitution of Channel 292C2 for Channel 292A at Holiday, and modification of the Station WLVU license to specify operation on Channel 292C2. The Holiday upgrade proposal required the substitution of Channel 293A for Channel 292A at Sarasota, Florida, and the substitution of Channel 256A for Channel 292A at Avon Park, Florida. The second counterproposal was filed by Thomasville Radio, Inc., licensee of Station WLOR, Channel 296A, Thomasville, Georgia, proposing an alternate channel allotment to Perry in order to permit the substitution of Channel 296C1 for Channel 296A at Thomasville and modification of its Station WLOR license to specify operation on Channel 296C1. The third counterproposal was filed by Ray W. Forrester proposing the allotment of Channel 295A to Live Oak, Florida, as a second local FM service. The fourth counterproposal was filed by Gator Broadcasting Corporation seeking the substitution of Channel 247C2 for Channel 249A at Micanopy, Florida, and modification of its license to specify operation on

[1] A fourth Petition for Reconsideration filed by Dolcom Broadcasting, Inc., is being dismissed at the request of the petitioner. For this reason, we will not consider Oppositions to the Dolcom Petition for Reconsideration filed by Asset Investments, Inc., and Thomasville Radio, Inc., and a Reply to the Thomasville Opposition filed by Dolcom. Since this was the only Petition for Reconsideration filed in MM Docket No. 87-486, we are also terminating that docket.

[2] Inasmuch as consideration of the Supplement will enable us to resolve this proceeding on the basis of a complete record and will not delay resolution of the proceeding, we hereby grant the Motion for Leave filed by SFM and Gator. Similarly, we will also consider the Supplement filed by Pasco.

Channel 247C2. To accommodate this upgrade, Gator requested the substitution of Channel 296A for vacant but applied for Channel 246A at Beverly Hills, Florida.[3]

4. In response to the *Notice* in MM Docket No. 87-486 involving Tallahassee and Quincy, Florida, we received two counterproposals. The first counterproposal was filed by Bitner-James Partnership, an applicant for the Channel 274A at Quincy, Florida. In its counterproposal, Bitner-James Partnership proposed the substitution of Channel 276C2 for Channel 274A at Quincy, and the accommodating substitution of Channel 298A for Channel 276A at Tallahassee, Florida. The second counterproposal was filed by Roy Simpson, Virgle Leon Strickland and Paul H. Reynolds ("SSR") proposing the allotments of Channel 297A to Crawfordsville, Florida, and Channel 298A to Bainbridge, Georgia.

5. In the *Report and Order*, we consolidated these dockets due to the conflict between the proposed Channel 296C1 upgrade at Thomasville and both the Channel 295A proposal at Perry in MM Docket No. 87-455 and the proposed Channel 298A substitution at Quincy in MM Docket No. 87-486 to accommodate Dolcom's proposed upgrade at Tallahassee. The *Report and Order* in this consolidated proceeding allotted Channel 291A to Live Oak, Florida, upgraded Station WLOR in Thomasville, Georgia, to specify operation on Channel 296C1, and upgraded Station WDFL in Cross City, Florida, to specify operation on Channel 295C1. In taking these actions, we denied the Dolcom proposal for a Channel 276C2 upgrade at Station WTHZ in Tallahassee, Florida, the Bitner-James Partnership proposal for a Channel 276C2 substitution at Quincy, Florida, and the Pasco proposal for a Channel 292C2 upgrade at Station WLVU in Holiday, Florida, as well as an alternate proposal advanced by Gator for a Channel 246C2 upgrade at Station WLVU.[4] Finally, as discussed in the next paragraph, the *Report and Order* affirmed the prior dismissal by letter of Gator's two petitions seeking a Channel 247C2 upgrade at Micanopy.

Gator Petition for Reconsideration

6. In its Petition for Reconsideration, Gator argues that it was improper to return its original Petition for Rule Making on the basis that a Channel 296A allotment at Beverly Hills with a 13.7-kilometer site restriction would not provide the requisite 70 dBu signal to Beverly Hills. Gator also argues that, in any event, any defect in its original proposal involving Channel 296A at Beverly Hills was resolved by its subsequent proposal proposing Channel 292A for Beverly Hills. Finally, Gator disputes the determination in the *Report and Order* that a nonadjacent Channel 246C2 upgrade at Holiday and license modification for Station WLVU, necessary to accommodate the Channel 292A substitution at Beverly Hills, cannot be made in this proceeding because it would be subject to competing expressions of interest and the Station WLVU licensee has not consented to the nonadjacent upgrade. Rather, Gator contends that the upgrade can be made without affording other parties an opportunity to apply for the upgraded allotment because it is an incompatible channel swap between Channel 246 at Beverly Hills and Channel 292 at Holiday.

7. After careful review of Gator's Petition for Reconsideration, we find that the first two arguments raised by it were already considered and rejected in the *Report and Order*. In rejecting the arguments advanced by Gator in support of its earlier Petitions for Reconsideration, the *Report and Order* concluded that the original Petition for Rule Making involving a proposed Channel 296A substitution at Beverly Hills was technically unacceptable due to noncompliance with Section 73.315 of the Commission's Rules, and that it would be an inefficient use of Commission resources to accept and process a clearly defective Petition for Rule Making. The *Report and Order* also determined that the subsequent Gator proposal involving a Channel 292A substitution at Beverly Hills was untimely because it was not filed by the December 14, 1987, counterproposal deadline. *See Pinewood, SC*, 5 FCC Rcd 7609 (1990). Because this aspect of the Gator Petition for Reconsideration directed against a *Report and Order* denying prior petitions for reconsideration merely repeats previously rejected arguments, we dismiss it as repetitious. *See* 47 C.F.R. Section 1.429(i). With respect to Gator's contention that the proposed nonadjacent channel upgrade at Holiday could be done without opening up the licensee to other expressions of interest, we agree that this could be done as an incompatible channel swap between Channel 246 at Beverly Hills and Channel 292 at Holiday.[5] However, since this was advanced in a late filed counterproposal, it could not be considered in this proceeding. *See* 47 C.F.R. Section 1.420(d). Accordingly, Gator's Petition for Reconsideration will be dismissed. This action does not preclude Gator from submitting a new Petition for Rule Making after the conclusion of this proceeding.

Pasco Petition for Reconsideration

8. The *Report and Order* also denied the Pasco counterproposal proposing the substitution of Channel 292C2 for Channel 292A at Holiday, Florida, and modification of the Station WLVU license to specify operation on Channel 292C2. In order to accommodate this upgrade, Pasco had

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[3] This Petition was dismissed by letter as technically deficient because the proposed Channel 296A substitution would not provide Beverly Hills with city grade coverage. To correct this deficiency, Gator filed another Petition proposing to substitute Channel 292A, in lieu of Channel 296A, at Beverly Hills. To accommodate the Channel 292A substitution at Beverly Hills, Gator proposed a Channel 246C2 upgrade at Holiday in lieu of the Channel 292C2 upgrade advanced by Pasco. This Petition was an untimely counterproposal and was dismissed by letter. Gator filed Petitions for Reconsideration of the dismissal of both of its petitions.

[4] We also dismissed the Rahu Broadcasting, Inc., proposal for a Channel 295A allotment at Perry and the SSR counterproposal for new allotments at Crawfordsville and Bainbridge, Georgia, at the request of the petitioners. We also did not consider an untimely counterproposal by SFM for a Channel 293C2 upgrade at Station WSRZ in Sarasota, Florida submitted in MM Docket 87-455. *See* para. 12, *et seq.*, *infra*.

[5] *See Modification of FM Broadcast Licenses to Higher Class Co-Channel and Adjacent Channels*, 60 RR 2d 114, 120 (1986). *See also Clincho, VA*, 6 FCC Rcd 3732.

proposed two additional channel substitutions and license modifications. The first proposal was the substitution of Channel 293A for Channel 292A at Sarasota, Florida, and the modification of the license of Station WSRZ, Channel 292A, Sarasota, to specify operation on Channel 293A. The second proposal was the substitution of Channel 256A for Channel 292A at Avon Park, Florida, and the modification of the license of Station WWOJ, Channel 292A, Avon Park, to specify operation on Channel 256A. The proposed license modification at Avon Park required a transmitter relocation by Station WWOJ. In this connection, Pasco stated, in its counterproposal, as follows:

> It is understood that the licensee of WWOJ is amenable to such a site change, should it be required, provided it is reasonably compensated for its relocation expenses.

On May 26, 1989, Pasco submitted Supplemental Comments that included a letter from Highlands Media Co., Inc., licensee of Station WWOJ, stating its willingness to change channel and relocate its transmitter site in the event Channel 292C2 is allotted to Holiday, Florida. The *Report and Order* stated that Pasco had not provided, at the time of the submission of its counterproposal, "any definitive showing that its belief is true." With respect to the proposed relocation of the Station WWOJ transmitter site, the *Report and Order* reiterated Commission policy of not proposing an allotment substitution which would require an existing licensee to relocate its transmitter site in the absence of a statement from the licensee stating its agreement to the relocation. In the present situation, Pasco did not correct this deficiency until nearly one and one-half years after the filing of the counterproposal. For this reason, the *Report and Order* did not accept the Pasco Supplemental Comments. In regard to the letter from the licensee of Station WWOJ contained in the Supplemental Comments, the *Report and Order* stated that counterproposals must be technically correct at the time of filing.

9. In support of its Petition for Reconsideration, Pasco argues that its counterproposal with respect to Station WWOJ is not a "forced relocation" of a transmitter site. In this regard, Pasco states that its consulting engineer for the proposed upgrade at Holiday, James M. Johnston, is the president of Highlands Media Company, Inc., licensee of Station WWOJ. Pasco has included Declarations from James M. Johnston and Duanne F. McConnell, vice-president of Highlands Media Company, Inc., both attesting to the fact that they had agreed to the relocation of the Station WWOJ transmitter site prior to the time Pasco submitted its counterproposal in this proceeding. Pasco also distinguishes *Boalsburg, Pennsylvania*, 3 FCC Rcd 6116 (1988), which was cited in the *Report and Order* as authority to deny a proposal requiring a "forced relocation" of a transmitter site. In *Boalsburg*, Pasco states that there was no indication that the petitioner had ever contacted the affected station. Furthermore, in regard to the Commission policy of requiring rule making proposals to be technically correct at the time of filing, Pasco notes that in *Broken Arrow, Oklahoma, supra*, preclusion studies with respect to noncommercial educational service were submitted in reply comments. In addition, Pasco refers to our action in *Johnston, South Carolina*, 55 RR 2d 752 (1983), in which we permitted, in the context of an agreement among parties resolving petitions for reconsideration, an affected station relocating its transmitter even though it had earlier opposed such a relocation in the rule making proceeding.

10. SFM filed an Opposition directed against the Pasco Petition for Reconsideration seeking a Channel 292C2 upgrade at Station WLVU in Holiday. In its Opposition, SFM agrees with the earlier action denying the Pasco counterproposal due to the failure to demonstrate the consent of Station WWOJ to relocate its transmitter site. SFM also argues that we could upgrade Station WLVU at Holiday on Channel 246C2 as an "incompatible channel swap" thereby permitting its Channel 293C2 upgrade at Sarasota.

11. After careful consideration of this matter, we believe that the public interest would be served by granting the Pasco Petition for Reconsideration to the extent of considering the original counterproposal that sought a co-channel upgrade for Station WLVU. To implement this action we will be issuing an *Order to Show Cause* directed against the licensee of Station WSRZ in Sarasota, Florida.[6] In taking this action, we continue to find that the statement in the Pasco counterproposal concerning the consent of Station WWOJ to the proposed relocation lacks the degree of clarity that we expect in rulemaking proposals. However, Pasco's Supplemental Comments indicated that Pasco had, in fact, secured the unequivocal consent of Station WWOJ to a transmitter site relocation prior to the submission of its counterproposal and made an effort to indicate this fact in the counterproposal. Contrary to the view expressed by SFM, we do not believe that the draconian action of denial of the Holiday upgrade proposal is warranted in this situation. We also find that because of the complexity of this consolidated proceeding, the tardiness by Pasco in clarifying this matter did not delay an overall resolution.[7]

SFM Petition for Reconsideration

12. In this proceeding, SFM, licensee of Station WSRZ, Channel 292A, Sarasota, Florida, sought to substitute Channel 293C2 for Channel 292A at Sarasota and modify its Station WSRZ license to specify operation on Channel 293C2. SFM proposed this upgrade on April 6, 1988, in its Petition for Leave to File Reply and Reply Comments. In effect, SFM supported the second Gator rulemaking proposal looking toward a Channel 246C2 upgrade at Station WLVU in Holiday which would then make the Channel

[6] It is not necessary to issue an *Order to Show Cause* directed against Highlands Media Company, Inc., licensee of Station WWOJ, Avon Park, because it has consented to the proposed channel substitution and transmitter relocation.

[7] As discussed in para. 8 *supra*, we agree that Station WLVU could be upgraded to Channel 246C2 without considering competing expressions of interest in the channel because it involves an incompatible channel swap, but this would require a separate proceeding.

293C2 upgrade at Sarasota possible. In the absence of a Channel 246C2 upgrade for Station WLVU at Holiday, the existing Station WLVU allotment on Channel 292A and Pasco's proposed Channel 292C2 upgrade for Station WLVU preclude a Channel 293C2 upgrade for Station WSRZ.

13. The *Report and Order* accepted the SFM Reply Comments for consideration in this proceeding in order to "crystallize the issues." As discussed earlier, the *Report and Order* denied reconsideration of the Gator Petition for Rule Making which, among its other proposals, had proposed a Channel 246C2 upgrade at Station WLVU in Holiday. This denial precluded any consideration of a Channel 293C2 upgrade for Station WSRZ in Sarasota. In support of its Petition for Reconsideration, SFM argues that it was error for the *Report and Order* not to consider the Gator proposal because it would resolve a complex proceeding and provide for improved service in three communities. In this context, SFM contends that upon grant of the Gator proposal, we should also grant the Channel 293C2 upgrade for Station WSRZ. SFM states that the Sarasota upgrade would not prejudice any party in this proceeding and that it would be an inefficient use of Commission resources to institute a new rule making proceeding to consider an upgrade in Sarasota.

14. We deny the SFM Petition for Reconsideration. The SFM upgrade proposal was an untimely counterproposal. Section 1.420(d) of the Commission's Rules requires that counterproposals be filed by the comment date. The comment date in MM Docket No. 87-455 was December 14, 1987. SFM did not file its proposal until April 6, 1988, which made it ineligible for consideration in this proceeding. *See Pinewood, South Carolina, supra.* We recognize that granting an upgrade for Station WSRZ would have public interest benefits for the Sarasota area. However, the Sarasota upgrade proposal has never been placed on a Public Notice or otherwise been subject to public comment. It conflicts with the timely filed counterproposal for the cochannel upgrade in Holiday. Acceptance and grant of the SFM proposal would undermine the certainty and predictability of our cut-off rules. Summarily granting the Sarasota upgrade proposal would also be unfair to other parties with potentially conflicting proposals. For all these reasons, we find that on balance the public interest would not be served by prejudicing these other potential rule making proponents in order to consider and grant SFM's untimely proposal. We believe that it would be in the public interest, however, to terminate this proceeding and to consider any Sarasota upgrade proposal in a subsequent proceeding triggered by the filing of an appropriate petition for rule making.

15. Accordingly, IT IS ORDERED, That the aforementioned Petition for Reconsideration filed by Gator Broadcasting Corporation IS DISMISSED.

16. IT IS FURTHER ORDERED, That the aforementioned Petition for Reconsideration filed by Sarasota FM, Inc., IS DENIED.

17. IT IS FURTHER ORDERED, That the aforementioned Petition for Reconsideration filed by Dolcom Broadcasting, Inc., IS DISMISSED.

18. IT IS FURTHER ORDERED, That the aforementioned Petition for Reconsideration filed by Pasco Pinellas Broadcasting Company IS GRANTED.

19. IT IS FURTHER ORDERED, That MM Docket No. 87-486 IS TERMINATED.

20. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Dispatch Communications of the
Mid Atlantic, Inc.

Notice of Apparent Liability
for Forfeiture Penalty for
Station WNCT547 in
the Private Land Mobile Radio
Services at Churchville, MD

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 17, 1992; Released: April 22, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against Dispatch Communications of the Mid Atlantic, Inc., Bethesda, Maryland, a licensee in the Commission's Private Land Mobile Radio Services, call sign WNCT547. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Sec. 17.23 and 17.50), the lighting of radio antenna towers (47 C.F.R. Sec. 17.26) and notification to the FAA if tower lights malfunction (47 C.F.R. Sec. 17.48(a)). *See also* 47 C.F.R. Sec. 17.47(a)(1).

2. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29, on September 9 and 10, 1991. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Sec. 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Sec. 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Sec. 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sec. 17.23 and 17.50. Dispatch Communications of the Mid Atlantic, Inc., therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing FAA notification regarding malfunctioning lights and the painting of towers.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *Deregulation - Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934. 47 USC Section 503(b). Pursuant to our *Policy Statement, Standards for Assessing Forfeiture*, 6 FCC Rcd 4695 (1991), *recon. pending*, the base amount of a monetary forfeiture penalty for failure by a Private Land Mobile licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that Dispatch Communications of the Mid Atlantic, Inc. IS APPARENTLY LIABLE FOR A FORFEITURE of Eight Thousand Dollars ($8,000) for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Dispatch Communications of the Mid Atlantic, Inc. shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Any written response regarding why the forfeiture should be reduced or not imposed should be sent to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt re-

quested, to Dispatch Communications of the Mid Atlantic, Inc., 4600 East West Highway, Suite 620, Bethesda, Maryland 20814.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

North American Teletrac:
Location Technologies, Inc.

Notice of Apparent Liability
for Forfeiture Penalty for
Station WNRZ300 in
the Private Land Mobile Radio
Services at Churchville, MD

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 17, 1992; Released: April 22, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against North American Teletrac: Location Technologies, Inc., a licensee in the Commission's Private Land Mobile Radio Services, call sign WNRZ300. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Sec. 17.23 and 17.50), the lighting of radio antenna towers (47 C.F.R. Sec. 17.26) and notification to the FAA if tower lights malfunction (47 C.F.R. Sec. 17.48(a)). *See also* 47 C.F.R. Sec. 17.47(a)(1).

2. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29, on September 9 and 10, 1991. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Sec. 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Sec. 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Sec. 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sec. 17.23 and 17.50. North American Teletrac: Location Technologies, Inc., therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing FAA notification regarding malfunctioning lights and the painting of towers.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *Deregulation - Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934, 47 USC Section 503(b). Pursuant to our *Policy Statement, Standards for Assessing Forfeiture*, 6 FCC Rcd 4695 (1991), *recon. pending*, the base amount of a monetary forfeiture penalty for failure by a Private Land Mobile licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that North American Teletrac: Location Technologies, Inc. IS APPARENTLY LIABLE FOR A FORFEITURE of Eight Thousand Dollars ($8,000) for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that North American Teletrac: Location Technologies, Inc. shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Any written response regarding why the forfeiture should be reduced or not imposed should be sent to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt re-

quested, to North American Teletrac: Location Technologies, Inc., 9800 La Cienega Boulevard, Suite 1005, Inglewood, California 90301.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Kenneth M. Smithson

Notice of Apparent Liability
for Forfeiture Penalty for
Station WNIS925 in
the Private Land Mobile Radio
Services at Churchville, MD

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 17, 1992; Released: April 22, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against Kenneth M. Smithson, Bel Air, Maryland, a licensee in the Commission's Private Land Mobile Radio Services, call sign WNIS925. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Sec. 17.23 and 17.50), the lighting of radio antenna towers (47 C.F.R. Sec. 17.26) and notification to the FAA if tower lights malfunction (47 C.F.R. Sec. 17.48(a)). *See also* 47 C.F.R. Sec. 17.47(a)(1).

2. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29, on September 9 and 10, 1991. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Sec. 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Sec. 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Sec. 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sec. 17.23 and 17.50. Kenneth M. Smithson, therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing FAA notification regarding malfunctioning lights and the painting of towers.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *Deregulation - Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934, 47 USC Section 503(b). Pursuant to our *Policy Statement, Standards for Assessing Forfeiture*, 6 FCC Rcd 4695 (1991), *recon. pending*, the base amount of a monetary forfeiture penalty for failure by a Private Land Mobile licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that Kenneth M. Smithson IS APPARENTLY LIABLE FOR A FORFEITURE of Eight Thousand Dollars ($8,000) for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Kenneth M. Smithson shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Any written response regarding why the forfeiture should be reduced or not imposed should be sent to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to Kenneth M. Smithson, 29B Ellendale Street, Bel Air, Maryland 21014.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Whiteford Construction Co., Inc.

Notice of Apparent Liability
for Forfeiture Penalty for
Station WYN545 in
the Private Land Mobile Radio
Services at Churchville, MD

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 17, 1992; Released: April 22, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against Whiteford Construction Co., Inc., Whiteford, Maryland, a licensee in the Commission's Private Land Mobile Radio Services, call sign WYN545. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Sec. 17.23 and 17.50), the lighting of radio antenna towers (47 C.F.R. Sec. 17.26) and notification to the FAA if tower lights malfunction (47 C.F.R. Sec. 17.48(a)). *See also* 47 C.F.R. Sec. 17.47(a)(1).

2. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29, on September 9 and 10, 1991. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Sec. 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Sec. 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Sec. 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sec. 17.23 and 17.50. Whiteford Construction Co., Inc., therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing FAA notification regarding malfunctioning lights and the painting of towers.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *Deregulation - Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934. 47 USC Section 503(b). Pursuant to our *Policy Statement, Standards for Assessing Forfeiture*, 6 FCC Rcd 4695 (1991), *recon. pending*, the base amount of a monetary forfeiture penalty for failure by a Private Land Mobile licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that Whiteford Construction Co., Inc. IS APPARENTLY LIABLE FOR A FORFEITURE of Eight Thousand Dollars ($8,000) for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Whiteford Construction Co., Inc. shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Any written response regarding why the forfeiture should be reduced or not imposed should be sent to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to Whiteford Construction Co., Inc., 1605 Dooley Road, Whiteford, Maryland 21160.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Central Atlantic Contractors, Inc.

Notice of Apparent Liability
for Forfeiture Penalty for
Station WAF295 in
the Private Land Mobile Radio
Services at Churchville, MD

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 17, 1992; Released: April 22, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against Central Atlantic Contractors, Inc., Aberdeen, Maryland, a licensee in the Commission's Private Land Mobile Radio Services, call sign WAF295. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Sec. 17.23 and 17.50), the lighting of radio antenna towers (47 C.F.R. Sec. 17.26) and notification to the FAA if tower lights malfunction (47 C.F.R. Sec. 17.48(a)). *See also* 47 C.F.R. Sec. 17.47(a)(1).

2. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29, on September 9 and 10, 1991. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Sec. 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Sec. 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Sec. 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sec. 17.23 and 17.50. Central Atlantic Contractors, Inc., therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing FAA notification regarding malfunctioning lights and the painting of towers.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *Deregulation - Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934, 47 USC Section 503(b). Pursuant to our *Policy Statement, Standards for Assessing Forfeiture*, 6 FCC Rcd 4695 (1991), *recon. pending*, the base amount of a monetary forfeiture penalty for failure by a Private Land Mobile licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that Central Atlantic Contractors, Inc. IS APPARENTLY LIABLE FOR A FORFEITURE of Eight Thousand Dollars ($8,000) for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Central Atlantic Contractors, Inc. shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Any written response regarding why the forfeiture should be reduced or not imposed should be sent to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to Central Atlantic Contractors, Inc., 1550 S. Philadelphia Boulevard, Aberdeen, Maryland 21001.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Roberto Pizano
Tampa, Florida

NOTICE OF APPARENT LIABILITY

Adopted: March 20, 1992; Released: April 24, 1992

By the Commission:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), to Roberto Pizano for willful violation of Section 301 of the Communications Act, 47 U.S.C. § 301. On November 18, 1991, Mr. Pizano operated an unlicensed station on 7080.8 kHz.

2. The appropriate amount of forfeiture for this violation is $8,000.

II. BACKGROUND

3. The Commission became aware of the operation of an unlicensed station through a publication for shortwave listeners. Upon receiving a complaint from an amateur about this unlicensed station in the 40 meter amateur band, the Commission's Field Operations Bureau (FOB) located the source of the transmissions as RA Auto Wholesale, 3912 1/2 West South Avenue, Tampa, Florida. The owner of the establishment informed FOB that he knew nothing of the radio operation and that he only furnished the space to Mr. Pizano's organization.

4. The schedule of Mr. Pizano's operation was given over the air and he used his name on the air. Mr. Pizano was interviewed by FOB staff and took full responsibility for the unlicensed operation.

5. The nature of the transmissions was anti-Castro propaganda. Mr. Pizano spoke as president of "Federacion Mundial de Ex-Presos Politicos Cubanos." It is alleged that Mr. Pizano is a former political prisoner who spent 18 years in a Cuban prison.

III. DISCUSSION

6. Mr. Pizano has clearly violated Section 301 of the Communications Act.

7. The violation on November 18, 1991, is clearly willful.

8. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Record 4695 (1991), *recon. pending*, the base forfeiture amount is $8,000 for operation without an instrument of authorization.

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that Roberto Pizano IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of $8,000 for operating an unlicensed station in violation of Section 301 of the Communications Act. The amount specified was determined after consideration of the factors set forth in Section 503(b) of the Communications Act.

10. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. § 1.80(f)(3), that Roberto Pizano shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

Send written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: NAL response
Room 744
1919 M Street, NW
Washington, D.C. 20554

11. IT IS FURTHER ORDERED that the Secretary shall send, by registered mail, a copy of this Notice of Apparent Liability for Monetary Forfeiture to Roberto Pizano, 6513 La Mesa Circle, Tampa, Florida 33634.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Richard E. Mattice
Zion, Illinois

NOTICE OF APPARENT LIABILITY

Adopted: March 20, 1992; Released: April 24, 1992

By the Commission:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, ("the Act"), 47 U.S.C. § 503(b), to Richard E. Mattice for willfull violation of Sections 325 and 301 of that Act. On June 7, 1991, from 2:45 PM to 3:20 PM CST, on Lake Michigan in Lake County, Illinois, Mr. Mattice transmitted false distress communications using an unlicensed station.

2. The appropriate amount of forfeiture for these violations is $16,000.

II. BACKGROUND

3. On June 7, 1991, Lake County Marine Units 676 and 675 (Lake County Sheriff's Office) and Coast Guard Station Kenosha (Wisconsin) vessel CG 41325 responded to a "MAYDAY" on Marine Channel 16 by a vessel reportedly taking on water on Lake Michigan near North Point Harbor. Lake County Marine Unit 676 ("Unit 676") identified the source of the transmissions, through radio direction-finding, to be the vessel "It'l Do." As Unit 676 approached that vessel the "It'l Do" got under way. Unit 676 followed and stopped the vessel. Unit 675 and CG 41325 also intercepted the vessel. The "It'l Do" was escorted to Lake Point Harbor by Unit 676 and the Coast Guard where it was boarded by both the Lake County Sheriff's Office and the Coast Guard. The Coast Guard interrogated Mr. Richard E. Mattice and determined that he was the operator who transmitted the "MAYDAY." The Coast Guard determined that there had been no distress situation. As there was evidence of alcohol consumption by Mr. Mattice, he was given a field sobriety test, which he passed. The Coast Guard also determined at inspection that the station was not licensed.

III. DISCUSSION

4. The transmission of the false distress signal, including repeated use of the word "MAYDAY," was a violation of Section 325(a) of the Act, 47 U.S.C. § 325(a), and was willful and deliberate.

5. The use of an unlicensed transmitter was a violation of Section 301 of the Act, 47 U.S.C. §301, and was willful.

6. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Record 4695 (1991), *recon. pending*, the base forfeiture amount is $8,000 for the false distress communications and $8,000 for operation without an instrument of authorization. No adjustments appear warranted.

IV. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that Richard E. Mattice IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of $16,000 for transmitting false distress signals in violation of Section 325(a) of the Communications Act and for unlicensed operation in violation of Section 301 of the Communications Act. The amount specified was determined after consideration of the factors set forth in Section 503(b) of the Communications Act.

8. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. § 1.80(f)(3), that Richard E. Mattice shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

Send written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: NAL response
Room 744
1919 M Street, NW
Washington, D.C. 20554

9. IT IS FURTHER ORDERED that the Secretary shall send by registered mail a copy of this Notice of Apparent Liability for Monetary Forfeiture to Richard E. Mattice, 40767 Cornell, Zion, Illinois 60099.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-108

In re Applications of

SUMTER RADIO PARTNERS — File No. BPH-880310NM

IRIS COMMUNICATIONS, INC. — File No. BPH-880310NS

For Construction Permit for a
New FM Station on Channel 234A
at Sumter, South Carolina

Appearances

John H. Midlen, Jr., and Gregory H. Guillot on behalf of Sumter Radio Partners; and *Gary S. Smithwick* on behalf of Iris Communications, Inc.

DECISION

Adopted: April 14, 1992; Released: April 30, 1992

By the Review Board: MARINO (Chairman) and BLUMENTHAL. Board Member ESBENSEN absent.

Board Member BLUMENTHAL:

1. Before the Review Board is the *Initial Decision*, 6 FCC Rcd 5997 (ALJ 1991) (*I.D.*), of Administrative Law Judge Richard L. Sippel (ALJ) in the above-captioned proceeding which granted the application of Iris Communications, Inc. (Iris) for a new FM station at Sumter, South Carolina, and denied the competing application of Sumter Radio Partners (SRP). Also before the Board are the exceptions of SRP and related pleadings.[1] For the reasons set forth below, we affirm the ALJ's grant of Iris' application.

2. After an evidentiary hearing, the remaining applicants in this proceeding were compared under the standard comparative issue which is grounded on the Commission's long-standing *Policy Statement on Comparative Broadcast Hearings (1965 Policy Statement)*, 1 FCC 2d 393 (1965).[2] Neither party has challenged this essential premise to the *I.D.* The ALJ determined Iris to be the superior applicant under both of the *1965 Policy Statement's* primary objectives, diversification of control of the media of mass communications and best practicable service to the public. *Id.* at 394. The ALJ concluded that Iris' 25% voting stockholder's membership on the board of trustees of a college owning a local AM station is a *de minimis* interest for purposes of diversification. *I.D.*, ¶ 42. SRP was assessed a substantial diversification demerit for its two 40% general partners' ownership of another local AM station, among other interests. *I.D.*, ¶ 43. Iris was awarded 100% quantitative integration credit for its plan to integrate its four voting stockholders into the full-time management of the proposed station. *I.D.*, ¶ 45. SRP's proposal to integrate its 20% general partner was not credited.[3] *I.D.*, ¶ 44.

3. SRP excepts to the ALJ's award of integration credit to Iris and his declination of integration credit to SRP. SRP further argues that the two applicants are equal under the diversification criterion. We will turn first to SRP's further exceptions addressing the ALJ's earlier refusal to specify a hearing issue to explore Iris' financial qualifications.

BACKGROUND

4. SRP excepts to a ruling by the ALJ which denied an August 9, 1990 Motion to Enlarge Issues (Haley Motion) filed by former applicant Sharron Annette Haley requesting the addition of a financial qualifications issue against Iris. *See Memorandum Opinion and Order (MO&O)*, FCC 90M-3013, released September 24, 1990. SRP asserts that the proceeding must be returned to the ALJ for hearing

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[1] Sharron Annette Haley, a former party to this proceeding, filed a Petition for Leave to Intervene on November 20, 1991, asserting that her participation would materially assist the Board in resolving certain questions relating to Iris' qualifications. Iris opposed the petition. As SRP has raised Haley's very arguments in its exceptions, Haley's participation would not be useful. Her petition will be denied in accordance with 47 C.F.R. § 1.223(b). *See Denton FM Radio, Ltd.*, 56 RR 2d 171, 172 (Rev. Bd. 1984) (former party not entitled to intervene in comparative hearing where no showing of how its participation would assist the Commission in resolving the issues before it).

SRP requested oral argument. Because we find that oral argument would not provide valuable assistance in resolving the issues before the Board, the request will be denied. *See Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 163 (1991).

Also before the Board are two petitions for leave to amend. SRP's January 31, 1992 amendment reports recent application filing activities of general partner Charles A. Barton. Iris' February 13, 1992 amendment reports that voting stockholder Ralph W. Canty is a member of the South Carolina House of Representatives. For good cause shown, both amendments will be accepted for reporting purposes.

[2] *But see Bechtel v. FCC*, No. 91-1112 (D.C. Cir. Jan. 31, 1992) (remand to consider validity of integration criterion); *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd _____ (FCC 92-98, released Apr. 10, 1992) (rule making proceeding to consider, *inter alia*, whether to modify or abandon the integration criterion). In this latter regard, the Board notes that the Commission has announced that any new criteria adopted pursuant to its *Reexamination* would not apply to cases currently in hearing status. *See id.*, ¶ 41. Thus, pending further guidance, the Board must, it believes, apply the *1965 Policy Statement*.

[3] Completing the analysis, the ALJ found that Iris' integration proposal was enhanced by its integrated principals' residence within the community of license. He did not reach Iris' claim to enhancement credit for the minority and female participation in its proposal. *I.D.*, ¶ 46. The ALJ awarded SRP a very slight preference for efficient use of the frequency for its proposal to provide a new fourth service to 880 persons and a new fifth service to 3,925 persons. *I.D.*, ¶ 41.

on the requested financial qualifications issue against Iris. In support of its argument, SRP posits that Iris' bank letter is an accommodation and that a second, post-certification letter obtained by Iris from the bank cannot cure the perceived defect in its financial qualifications. SRP further maintains that Iris did not alternatively rely on its principals' personal finances when it certified to its financial qualifications, and that if it did, such reliance was insufficient.

5. Prior to completing the financial certification in its application, Iris obtained the following letter addressed to Iris, Inc., and dated March 4, 1988, on the letterhead of the National Bank of South Carolina (NBSC), of Sumter. That letter states:

> We are pleased to be made aware of your intention of submitting an application to the FCC to obtain a permit for the construction of a Radio Station. This letter does not represent a loan commitment expressed or implied on the part of The National Bank of South Carolina, however, we do express a willingness to support a loan under the following terms and conditions:
>
> 1. The principal amount of _____[4] (Any changes from the original stated estimated amount will necessitate a reevaluation of your equity position by NBSC).
>
> 2. Term - Maximum of 15 years with a three year maturity feature for both rate and term negotiation.
>
> 3. Verification of an adequate cash flow to service the debt acceptable to NBSC within the continental United States.
>
> 4. Rate - NBSC Prime rate plus 2% Floating or a fixed rate to be negotiated at the time of the loan origination.
>
> 5. Collateral acceptable to NBSC to fully collateralize the loan with assets within the State of South Carolina.
>
> We wish you every success in your application and look forward to working with you.
>
> Sincerely,
>
> /s/
> Robert N. Boykin, Jr.
> Vice President

Haley Motion, Exhibit A.

6. Iris' financial certification and application were executed by former Iris officer, and current non-voting stockholder, L.C. Frederick. Frederick described the applicant's pre-certification activities in an August 25, 1990 Declaration. He stated:

> I knew how much Iris would need to construct and operate the facilities for three months without revenue. Before I executed the application, I had reviewed the financial statements of all the other shareholders of Iris. Except for Leroy Durant, all shareholders agreed to contribute capital to meet Iris' needs. I also reviewed a letter dated March 4, 1988, from National Bank of South Carolina, which expressed a willingness to support a loan to Iris. The bank letter was sufficient alone to cover the estimated costs of construction and operation of the station. The net worth of the stockholders of Iris was also sufficient to cover the costs of construction and operation of the station.

Iris Opposition to Haley Motion, Attachment A.

7. When questioned at his July 10, 1990 deposition as to why Iris had approached NBSC for a loan when the stockholders purportedly had the ability to finance the project from their own funds, Iris president and 25% voting stockholder Ralph W. Canty explained:

> Our group is a very solvent group, there is no question about that. But when looking at the various ways of capitalizing the corporation we agreed that getting financing from a local bank was the best route.

Haley Motion, Exhibit C (Canty Depo. Tr. 31).

8. In June 1990, as the proceeding was entering its discovery phase, counsel advised Iris to prepare individual financial statements of its stockholders and to revisit NBSC to obtain a "stronger" financial letter. *Id.*, at 76. Acting on counsel's advice, Canty then obtained on behalf of Iris a second letter from NBSC. The second letter, dated July 3, 1990, provides:

> This letter supplements and clarifies our letter of March 4, 1988 to Iris, Inc.
>
> This letter is to furnish Iris Communications, Inc. with reasonable assurance of the availability of a loan of *[amount redacted]* according to the terms set out in the March 4th letter. We have examined the collateral which you propose to furnish and it appears adequate to collateralize a loan with reasonable assurance.
>
> We understand that you do not require a contractually binding commitment from us at this time and this letter is not such a commitment. We do intend, by this letter, to give you reasonable assurance of our intention to make these funds available. Funding in the amount indicated will be subject to submission and approval of a formal loan application and the execution by the corporation and guarantors of the loan and security documents incorporating the terms and conditions previously mentioned.

[4] In accordance with an agreement of counsel, Iris redacted the loan principal amount from the copy of the letter that it produced to the parties during the discovery phase of the proceeding.

> Very truly yours,
> /s/
> Walter M. Dunlap III
> Vice President
> Haley Motion, Exhibit B.

9. Robert N. Boykin, Jr., NBSC Vice President and signer of the first Iris bank letter, described the bank's view of the circumstances underlying the preparation of the two letters in an August 31, 1990 Declaration. He stated:

> At the outset, I wish to state that the letters were intended to confirm the willingness of NBSC to make available funds on certain conditions in the amount set forth in the letters to Iris Communications, Inc., for the purpose of constructing and operating a new FM radio station at Sumter, South Carolina.
>
> * * *
>
> [W]e believe the collateral as reported to NBSC by the principals that they propose to make available to the bank would be completely adequate to support a loan in the amount which Iris requests.
>
> * * *
>
> Of the ten stockholders of Iris, eight stockholders are customers of NBSC, and have been so for a long period of time. When the March 4, 1988, letter was written, I was unaware that certain special language should appear in the letter. Although we had discussed the terms described in this Declaration, some of those terms did not appear in the letter. The July 3, 1990, letter was written to supply some of those terms which should have been in the earlier letter.
>
> Subject to the above statements, NBSC has furnished Iris with reasonable assurance of the availability of a loan.
>
> The bank has a long and established relationship with eight of the ten stockholders of Iris. NBSC is thoroughly familiar with Iris' current business plan, and other features of the project, and the stockholders' assets and credit history.
>
> Iris has provided the bank with financial information, which appears satisfactory. Adequate collateral has been discussed with NBSC by Iris' principals. NBSC has made a preliminary review of the individual qualifications of the principals of Iris, and was comfortable with the results of the review at that time. No additional review has been made.

Iris Opposition, Attachment B.

10. After considering the above information and observing Frederick's demeanor at the hearing, the ALJ ruled that "[the two NBSC] letters, taken into context with surrounding circumstances, are *bona fide* reasonable assurances and *not* mere 'accommodations.'" *MO&O*, ¶ 9 (emphasis in original). The ALJ noted that Frederick had reviewed stockholder financial information and cost estimates before approaching NBSC for the first letter and that Boykin, the bank officer and author of the crucial first letter, knew most of Iris' principals as long-time customers of the bank.[5] The totality of these facts were found to negate any reasonable inference of accommodation. *MO&O*, ¶ 11. The ALJ concluded that Haley had failed to raise a *prima facie* case for adding the requested financial issued against Iris. *MO&O*, ¶ 12.

11. SRP now argues that the 1988 NBSC letter did not provide Iris with the requisite reasonable assurance of a loan because, quoting from *Scioto Broadcasters*, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990), *rev. denied*, 6 FCC Rcd 1893, *recon. dismissed*, 6 FCC Rcd 4626 (1991), the bank did not have the "long and established relationship with [Iris] sufficient to infer that [it] [was] thoroughly familiar with [Iris'] assets, credit history, current business plan and similar data." SRP states further that Iris did not provide data to the bank prior to the issuance of the 1988 letter sufficient to satisfy NBSC that adequate collateral was available for the loan. Relying on *Shawn Phelan*, 5 FCC Rcd 53 (Rev. Bd. 1990), SRP also faults Iris' reliance on the 1988 NBSC letter because there is no indication that Iris would be able to meet the condition of an adequate cash flow to service the debt. SRP argues that Iris cannot cure these perceived defects in the 1988 NBSC letter by relying on a later, post-certification letter from the bank.[6]

DISCUSSION

Financial Considerations

12. As we expounded in *Scioto Broadcasters*, and have since reiterated, where an applicant relies on funds from a lending institution to support its certification of financial qualifications, the Commission's determination of "reasonable assurance," the standard under which the applicant's financial qualifications are measured, is based on a review of the following factors:

> Whether (1) the bank has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's

[5] The ALJ further noted that, prior to certifying, Frederick had compared stockholder financial statements and cost estimates to confirm the applicant's ability to self-finance the project. *MO&O*, ¶ 11.

[6] SRP further disputes Frederick's statement that the financial certification was alternatively based on the stockholders' own resources. SRP states that Canty's deposition testimony, quoted *supra*, at ¶ 7, contradicts Frederick's assertion. SRP also argues that Iris' failure to produce its principals' financial statements during discovery or in response to Haley's motion is further evidence that Iris did not rely on its principals' funds. Finally, SRP states that if Frederick had relied on the stockholders' financial abilities to support Iris' certification, his analysis was flawed because it was based on a review of the principals' collective net worth and not on their net liquid assets.

> assets, credit history, current business plan, and similar data, *see Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978); or, (2) the prospective borrower has provided the bank with such data, and the bank is sufficiently satisfied with this financial information (*e.g.*, collateral guarantees, *see Chapman Radio and Television Co.*, 70 FCC 2d 2063, 2072 (1979)), that *ceteris paribus*, a loan in the stated amount would be forthcoming, and that the borrower is fully familiar with, and accepts, the terms and conditions of the proposed loan (*e.g.*, payment period, interest rate, collateral requirements, and other basic terms). Short of these ordinary fundamentals, it would be difficult to infer "reasonable assurance" from a "committed source. " In other words, central to any successful "reasonable assurance" showing of a loan from a financial institution is that the "individual qualifications" of the borrower have been preliminarily reviewed. *Christina Communications*, 2 FCC Rcd 1971, 1974 (1987), that adequate collateral has been demonstrated, *Chapman Radio*, *supra*, and that the tentative terms of the loan are specifically identified and are satisfactory to both borrower and lender.

5 FCC Rcd at 5160.

13. Based on the record before the ALJ, we find insufficient cause to overturn the denial of Haley's motion. While we understand Haley's questioning of the matter, the record seems to indicate that NBSC has had the type of long and established relationship with Iris' principals that the court found persuasive in *Multi-State Communications*. Robert Boykin, the author of the crucial 1988 precertification letter, stated that he was familiar with most of the Iris principals by virtue of their long-term association with NBSC. As such, Boykin knew of their credit histories and assets. Iris Opposition, Attachment B. Frederick, the Iris principal who obtained the 1988 letter, stated that prior to meeting with Boykin, he had determined the amount needed to construct and initially operate the proposed station and that he had reviewed the financial statements of the stockholders who were participating in the proposal's funding. Iris Opposition, Attachment A. While the record does not supply all of the lesser factual detail that might have been adduced, had a financial issue been tried below, the extant record afforded the ALJ a rational basis upon which to rule in Iris' favor. *Compare, e.g., Mableton Broadcasting Company, Inc.*, 5 FCC Rcd 6314, 6322 (Rev. Bd. 1990) (discussion comparing bank letters that are merely technically deficient for lack of a term to accommodation letters issued to "virtual strangers").[7]

14. Nor does the 1988 NBSC letter's failure to specify every precise condition to the loan present a *prima facie* question of "reasonable assurance." That letter identifies, with sufficient particularity, the identity of the borrower, the amount of the loan, how the loan proceeds would be used, the interest and repayment terms, and the conditions for final approval of the loan. Moreover, Boykin stated that he had closely reviewed Iris' proposed collateral, business plan, and other information and had found them satisfactory, but simply had not placed *all* of those terms into the original letter. Iris Opposition, Attachment B.[8] It thus appears that the second NBSC letter was meant only to augment the first one, to fill in the pre-existing collateral terms, and to add some solidifying semantic accoutrement. Thus, Haley and SRP have not demonstrated that the first letter's failure to include specific collateral and cash flow terms undermine its ability to convey "reasonable assurance." As we have previously held, a bank letter's failure to state some particular loan term is not always a fatal deficiency. *See Harrison County Broadcasting Co.*, 6 FCC Rcd 5819, 5821-22 (Rev. Bd. 1991); *A.P. Walter, Jr.*, 6 FCC Rcd 875, 877 (Rev. Bd. 1991). *Compare Peter Joseph Devlin and Patricia Eve Devlin*, 7 FCC Rcd _____ (92R-28, adopted March 31, 1992) (no reasonable assurance where applicant unable to satisfy bank's collateral criteria). Where the totality of the surrounding circumstances otherwise supports a plausible inference of "reasonable assurance," a letter's omission of a particular term does not, *eo ipso*, signal a mere "accommodation." *A.P. Walter, Jr.*, 6 FCC Rcd at 878 (bank letter without a repayment term provided reasonable assurance). *See also Colonial Communications, Inc.* 5 FCC Rcd 1967, 1968 (Rev. Bd.), *recon. denied*, 5 FCC Rcd 3797 (1990).[9] On the record before us, we cannot say that the ALJ erred in his ruling, either on the law or upon the particular facts presented.

Comparative Considerations

15. Turning to SRP's exceptions relating to the ALJ's resolution of the standard comparative issue, we find them to be similarly unpersuasive. The ALJ properly assessed a substantial comparative demerit against SRP for its plethora of attributable broadcast interests, including interests in Sumter and elsewhere within the state. Most notably, SRP's two 40% general partners, Charles A. Barton and John H. Midlen, Jr., SRP's communications counsel, together own Mid-Carolina Communications, Inc., licensee of Sumter AM station WSSC. SRP's 20% general partner and proposed general manager, Kevin D. Ireland, is WSSC's general manager. Barton additionally is Vice President of Price Broadcasting Company, licensee of South Carolina stations WEZLFM, Charleston, and

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[7] *Shawn Phelan*, 5 FCC Rcd 53 (Rev. Bd. 1990), does not compel a different result. There, it was most obvious that the bank had not reviewed that applicant's business plan, cost estimates, personal financial statement, or other information concerning its assets and net worth. Furthermore, the bank there did not provide the applicant with specific criteria that it would have to meet in order to qualify for the loan. *See id.*, at 54.

[8] The evidence before the ALJ did not identify the specific timing of NBSC's review of Iris' collateral, business plan, and financial statements; and it is, indeed, not absolutely conclusive on this record that all such matters were reviewed prior to the creation of the first letter. Nevertheless, the ALJ could justifiably conclude that Haley had not met *her* burden to establish a *prima facie* case against Iris' financial qualifications, and we find no countervailing record evidence of sufficient strength to overturn that seemingly reasonable resolution. *Cf. Priscilla L. Schwier*, 4 FCC Rcd 2659, 2660 (1989) (hearing required where facts on record reveal significant contradictions, citing *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir. 1988)), *aff'd by judgment sub. nom. New Life Evangelistic Center, Inc. v. FCC*, No. 89-1256 (D.C. Cir. Feb. 7, 1990).

[9] In view thereof, we find it unnecessary to address Iris' alternative reliance on its principals' finances to support the applicant's financial certification. Hence, we need not address Iris' counter-arguments regarding the procedural legitimacy of the Haley motion.

WOMG\WOMG-FM, Columbia.[10] SRP does not propose divestiture of any of these interests nor the termination of Ireland's position with WSSC. *I.D.*, ¶¶ 13-14; SRP Exh. 3.

16. SRP avers that Iris should receive an equivalent and counterbalancing diversification demerit due to Canty's involvement with Sumter station WQMC. Canty is one of a thirty-six member Board of Trustees of local Morris College which received the license of the 1000-watt AM station as a gift in 1989. Canty has not participated in the Board's activities since the college's acquisition of WQMC and his term ends in May 1992. *I.D.*, ¶¶ 15-16; Iris Exh. 6. We agree with the ALJ that Canty's relationship to WQMC is insignificant for purposes of diversification and thus is of *de minimis* weight. *See Bible Broadcasting Network, Inc.*, 7 FCC Rcd 432, 434 (Rev. Bd. 1992); *Marlin Broadcasting of Central Florida, Inc.*, 4 FCC Rcd 7945, 7951 (Rev. Bd. 1989), *recon. denied*, 5 FCC Rcd 322, *rev. denied*, 5 FCC Rcd 5751, *recon. dismissed*, FCC 90-409, released December 12, 1990, *aff'd*, No. 90-1505 (D.C. Cir. January 7, 1992). Moreover, Canty's daily hour-long airshift on WQMC does not involve control over any other WQMC programming nor any of the station's policies. *I.D.*, ¶ 16. We agree with the ALJ that the involvement does not rise to the level of a cognizable managerial interest and we thus find that no adverse diversification consequences result. *Cf. Las Americas Communications, Inc.*, 1 FCC Rcd 786, 792 (Rev. Bd. 1986) (subsequent history omitted).

17. "Diversification is a factor of primary significance since ... it constitutes a primary objective in the [Commission's] licensing scheme." *1965 Policy Statement*, 1 FCC 2d at 394. We uphold the ALJ's assessment of a substantial diversification demerit against SRP in view of Barton's and Midlen's ownership of a broadcast station within the community of license compounded by Barton's numerous other attributable broadcast interests within the state. *See Julia S. Zozoya*, 5 FCC Rcd 6607, 6608 (1990), *recon. denied*, 6 FCC Rcd 4416 (1991). Moreover, because of the primacy of the diversification factor over the integration factor, even were we to fully credit SRP's 20% integration proposal and to discredit completely Iris' 100% integration proposal, Iris would nonetheless prevail under the standard comparative issue based on the diversification factor alone. *See Sunshine Broadcasting, Inc.*, 6 FCC Rcd 5981, 5983-84 (Rev. Bd. 1991), *recon. denied*, 7 FCC Rcd 493 (Rev. Bd. 1992).[11]

18. ACCORDINGLY, IT IS ORDERED, that the Petition for Leave to Intervene filed by Sharron Annette Haley on November 20, 1991, IS DENIED; that the Motion for Leave to Amend filed by Sumter Radio Partners on January 31, 1992, IS GRANTED, and the associated amendment IS ACCEPTED; and, that the Petition for Leave to Amend filed by Iris Communications, Inc. on February 13, 1992, IS GRANTED, and the amendment IS ACCEPTED; and

19. IT IS FURTHER ORDERED, That the application of Iris Communications, Inc. (File No. BPH-880310NS) for a new FM station at Sumter, South Carolina, IS GRANTED and that the application of Sumter Radio Partners (File No. BPH-880310NM) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

[10] Price Broadcasting Company is also the licensee of Stations KEMX and KCPX, Salt Lake City, Utah; KGA and KDRK-FM, Spokane, Washington; KOOK and KRBE-FM, Modesto, California; KQMS and KSHA-FM, Redding, California; KROW and KNEV-FM, Reno, Nevada; and KHEZ-FM, Boise, Idaho. Barton is also a 45.79% owner and President and Director of Fox Valley Broadcasting, Inc., licensee of Station WQBZ-FM, Fort Valley, Georgia. *I.D.*, ¶ 14; SRP Exh. 3.

[11] Were it necessary to reach SRP's exceptions relating to the ALJ's award of 100% integration credit to Iris, we would have denied the exceptions. SRP raised no creditable arguments based on record fact or law against Iris' integration proposal, but merely criticized the plan as unrealistically optimistic. We find no basis to disturb the ALJ's crediting of the proposal. Thus, at best, SRP could claim 20% integration credit compared to 100% for Iris, which would yield a substantial preference to Iris. *See Doylan Forney*, 3 FCC Rcd 6330, 6338 (Rev. Bd. 1988), *review denied*, 5 FCC Rcd 5423 (1990), *aff'd by judgment sub nom. Maricopa Media, Inc. v. FCC*, No. 90-1456 (D.C. Cir. Oct. 7, 1991). SRP's minimal coverage advantage could not overcome the substantial diversification and integration preferences awarded Iris. *See Rancho Mirage Radio, A General Partnership*, 7 FCC Rcd 480, 483 (Rev. Bd. 1992); *Woods Communications Group, Inc.*, 6 FCC Rcd 3529, 3533 n.4 (Rev. Bd. 1991), *modified*, 7 FCC Rcd 78 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 10, 1992

FINDER'S PREFERENCE PROGRAM -- CHECKLIST

The Federal Communications Commission (Commission) recently established a Finder's Preference Program in the private land mobile radio services. *Report and Order*, PR Docket No. 90-481, 6 FCC Rcd 7297 (1991). The Finder's Preference Program provides incentives to eligible persons who submit information to the Commission that results in the recovery of unconstructed or non-operational private land mobile radio channels licensed on an exclusive basis in the 220-222 MHz, 470-512 MHz and 800/900 MHz bands (including 900 MHz Phase I SMRS). Persons assisting the Commission in finding unused channels in these bands are entitled to a "preference" for those channels ultimately recovered.

The Commission established specific guidelines for filing finders' preference requests. *Report and Order*, 6 FCC Rcd 7306 at para. 52. These guidelines were established to reduce the likelihood of abusive practices (*e.g.*, frivolous filings) and to increase the Commission's ability to administer the program smoothly and expeditiously. The Commission specifically cautioned that finders' requests not conforming to these guidelines would be dismissed without action.

To avoid summary dismissal, each finder's preference request must comply with each of the elements below at the time it is filed with the Commission:

1. State that you are requesting a finder's preference. Then, provide the name, address and call sign of the target licensee, even if you believe the licensee is not in business.

2. List the location and frequencies of the licensed facility; do not just refer, for example, to "the 800 MHz band."

3. List the Commission rule(s) that you allege the target licensee is violating; include any benchmark dates the target licensee missed.

4. Provide your statement -- who, what, why, where and when -- about the violation(s) you allege; have any witnesses provide separate statements. You have the burden of proof and must make a *prima facie* case; avoid general or conclusory statements.

5. Submit all statements under oath or under penalty of perjury pursuant to Section 1.16 of the Rules. Example: "I declare under penalty of perjury that the foregoing is true and correct." Just "subscribing" before a notary does not meet this requirement.

6. Serve, *e.g.*, by mail, the target licensee with a complete copy of your request on or before the day you file your request with the Commission. The only exception to this is noted in item 8.

7. Certify that you have served the target licensee. Anything else, such as advising the licensee that you have filed a finder's preference request, is insufficient; the licensee would not know your specific charges against it and would be unable to respond. (If your request has merit, successful service will speed our determination -- leading to your award letter -- so serve the FCC address of record and any "last known address" where you believe the target licensee may be located.)

8. Consensual preference requests -- file well before the existing licensee's construction and operation (8th month or 1 year) deadline.

File the existing licensee's cancellation request with the finder's award request. The finder will assume the existing licensee's construction and operation deadline if the Commission grants an award letter and the finder's timely application.

Consensual finders may file their application (Form 574) when filing their award request. File your application separately following regular application requirements; reference that you filed a consensual finder's request for the channel(s) you seek.

Consensual finders are not required to serve the existing licensee. This is the only exception to the service requirements (items 6 & 7).

Both the existing licensee and the finder must certify that they have not and will not give or receive any direct or indirect compensation in connection with the consensual license cancellation.

(A "consensual" finder's request is where a finder gets an existing licensee to cancel its license voluntarily because the existing licensee will be unable to construct and operate by its deadline.)

9. Use Form 155 (the FCC fee form) -- unless fee exempt. The fee for finders' preference requests is currently $105.00 per channel; the fee code is PDX. Call (717) 337-1212 for more fee information.

10. Do not file an application (Form 574) for the targeted channels until you receive a finder's preference award letter from the Commission. You will have 90 days from the date of your award letter to file an acceptable application with the Commission. Consensual finders may file their applications as noted in item 8.

11. Each finder's preference filing must stand on its own and must not cross-reference to other filings.

Finders' requests found deficient will be summarily dismissed and the applicant's filing fee and place in line forfeited. The Commission's Rules and the *Report and Order* govern over the general guidance provided by this notice.

For further information call Peter Daronco at (202) 632-7125.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-245

In the Matter of

Allocation Method for Unrouted Ship-to-Overseas INMARSAT Telex Traffic — RM No. 6013

ORDER INVITING COMMENTS TO SUPPLEMENT THE RECORD

Adopted: April 16, 1992; Released: April 24, 1992

Comment Date: May 27, 1992
Reply Comment Date: June 15, 1992

By the Deputy Chief, Common Carrier Bureau:

1. On May 20, 1988, the Commission released a Notice of Proposed Rule Making (NPRM) in CC Docket No. 88-245,[1] giving notice of its intention to develop a new mechanism for the allocation of unrouted[2] ship-to-overseas[3] telex[4] traffic transmitted over the space segment of the International Maritime Satellite Organization (INMARSAT)[5]. In the NPRM, the Commission tentatively concluded that sufficient unrouted ship-to-overseas telex traffic existed to warrant adoption of a specific allocation mechanism to distribute such traffic among carriers interconnecting with Comsat.[6]

2. Under the current rotational allocation method for unrouted ship-to-overseas telex traffic, Comsat rotates the delivery of traffic to each of the participating United States carriers in a manner that results in each carrier[7] receiving an approximately equal share of that traffic. The Commission has proposed to replace the rotational allocation method with a proportionate return allocation mechanism under which Comsat would distribute unrouted ship-to-overseas telex traffic to each carrier in proportion to the volume of overseas-to-ship telex traffic transiting the United States that each carrier handles via the INMARSAT space segment. The Commission tentatively concluded that the proportionate return allocation mechanism would provide an incentive for carriers to increase their competitive efforts, consistent with Commission policy.

3. We invite interested parties to update the record with regard to, *inter alia*, the relative volume of ship-to-overseas telex traffic that would be allocated under the proposed proportionate return mechanism.[8] In particular, we also request that Comsat provide for the record current traffic data that shows the distribution of traffic exchanged with each of the International Record Carriers for the period 1988 through 1991. We request that Comsat provide such data in both the ship-to-shore and shore-to-ship directions for both domestic and United States transit traffic. Further comments are invited to update other aspects of the record as well.

4. Accordingly, IT IS ORDERED, pursuant to Sections 0.91(g) and 0.291 of the Commission's Rules, 47 C.F.R. Sections 0.91(g), 0.291, that COMMENT IS INVITED in this proceeding.

5. IT IS FURTHER ORDERED that pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, comments SHALL BE FILED with the Secretary, Federal Communications Commission, Washington, D.C. 20554 on or before May 27, 1992, and reply comments SHALL BE FILED with the Secretary on or before June 15, 1992. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants wish each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. In addition, participants should file one copy of any such pleadings with the International Facilities Division, Common Carrier Bureau, Room 534, 1919 M Street, N.W., Washington, D.C. 20554. Participants should also file one copy of any documents filed in this docket with this Commission's copy contractor, The Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] *Allocation Method for Unrouted Ship-to-Overseas INMARSAT Telex Traffic*, 3 FCC Rcd 2654 (1988) (*NPRM*).

[2] In general, the term "unrouted traffic" refers to traffic that is not designated by the customer for handling by a particular common carrier.

[3] Ship-to-overseas telex traffic is telex traffic sent via the INMARSAT space segment to an earth station in the United States and from there, via the facilities of a United States carrier, to an overseas destination. Unrouted ship-to-overseas telex traffic is traffic for which the sender has not specified a United States carrier to handle the traffic between the United States earth station and the overseas destination.

[4] Telex refers to a customer-to-customer switched record service using telegraph-grade connecting circuits and characterized by a two-way communications capacity.

[5] INMARSAT is an independent international organization comprised of 64 member nations. It was created to establish an international maritime satellite system to improve maritime communications for distress and safety of life at sea, public correspondence, radiodetermination and ship management.

[6] The International Maritime Satellite Telecommunications Act, 47 U.S.C. Sections 751-757 (1986), designates Comsat as the United States operating entity in INMARSAT.

[7] As used herein, a participating carrier is a carrier which has entered into an interconnection agreement with Comsat for the handling of telex traffic via the INMARSAT satellite system. *See NPRM*, 3 FCC Rcd at 2654, n.5.

[8] *NPRM*, 3 FCC Rcd at 2656, para. 17.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — File No. USP-90-(W)-112

Petition for Waiver of the International Settlements Policy for Parallel International Routes for Accounting Rates and Division of Tolls for Packet Switched Service with the United Kingdom

MEMORANDUM OPINION AND ORDER

Adopted: April 16, 1992; Released: April 24, 1992

By the Deputy Chief, Common Carrier Bureau:

I. SUMMARY OF PLEADINGS

A. AT&T PETITION

1. On July 9, 1990, American Telephone and Telegraph Company (AT&T) filed a petition for waiver of the Commission's International Settlements Policy (ISP) to permit a change in the accounting rates for packet switched communications service between AT&T in the United States and British Telecom International (BTI) in the United Kingdom. AT&T states that, at present, the accounting rates for AT&T's ACCUNET Packet Service between the United States and the United Kingdom are $4.00 per connect hour and $4.00 per kilosegment. AT&T proposes a new accounting rate of 3.5 Special Drawing Rights (SDR) per kilosegment, effective May 1, 1990. AT&T and BTI have agreed to remove the accounting rate per connect hour.[1]

2. AT&T notes that BTI has indicated that packet switched communications service traffic between the United States and the United Kingdom is growing and is expected to increase. AT&T states that the proposed change in the accounting rates would enable any affected carrier to lower the collection rates it charges, thus further stimulating traffic and revenues. Further, AT&T states that, given the increased ability to stimulate outbound calls that a reduction in accounting rates on outbound calls affords any affected carrier, a reduction in accounting rates on inbound calls should have only a *de minimis* effect on AT&T's revenues and on the U.S. telecommunications industry overall.

3. AT&T claims that changes in the method of allocating return traffic among U.S. carriers were not included in the negotiations leading to the proposed accounting rates and there was no attempt by BTI to secure concessions in the accounting rates through any measures (such as reallocation of return traffic, or other special concessions) which would indicate whipsawing. AT&T asserts that the proposed new accounting rates are, therefore, in the public interest.

B. OPPOSITIONS

4. On August 8, 1990, US Sprint Communications Company Limited Partnership (US Sprint) and TRT/FTC Communications, Inc. (TRT/FTC) filed oppositions to AT&T's waiver request.[2]

1. US Sprint

5. US Sprint states that it supports the Commission's goal of lowered cost-based accounting rates, but it maintains that this goal is premised on the fact that cost-based accounting rates are generally in the public interest because they enable U.S. carriers to lower collection rates and reduce the U.S. balance of payments deficit in telecommunications services. US Sprint claims that this is true because, almost invariably, outbound traffic from the United States to foreign countries is stimulated by lower U.S. collection rates and the volume of such traffic substantially exceeds traffic in the inbound direction.

6. US Sprint asserts that AT&T fails to inform the Commission that, in contrast to voice telephone service, the overall balance of traffic between the U.S. and the United Kingdom for switched packet service is such that inbound (U.K.-U.S.) traffic exceeds the outbound (U.S.-U.K.) traffic. US Sprint notes that, when the balance of traffic is inbound, a lower accounting rate reduces the net revenues received by the U.S. carrier and can only tend to accelerate the growing deficit in the balance of settlement payments. US Sprint claims that the net decrease in revenues received by the U.S. carrier makes the service less profitable and thereby inhibits the U.S. carrier's ability to lower collection rates.

7. US Sprint also claims that, in effect, AT&T's waiver request represents a form of whipsawing. US Sprint notes that unless the accounting rate reduction favors the foreign PTT -- that is, unless such a reduction increases its revenues and increases the U.S. settlements deficit -- the foreign PTT has no incentive to agree to such a reduction with a particular U.S. carrier. US Sprint asserts that a grant of AT&T's waiver request would allow for accounting reductions only if the reductions favor a particular U.S. carrier and, at the same time, favor foreign administrations. US Sprint explains that since AT&T's balance of traffic is still in the outbound direction, a grant of AT&T's proposed waiver would benefit AT&T but would not benefit the United States generally. Thus, US Sprint concludes that it is not the U.S. consumer that benefits from the lower accounting rate, but the foreign correspondent.

8. Finally, US Sprint notes that a reduction in accounting rates between the United States and the United Kingdom as a part of an overall settlement between the two countries would conceivably be consistent with U.S. interests. However, because AT&T's proposed reduction in the accounting rate for switched packet services favors the foreign correspondent, US Sprint alleges that the U.S. carrier loses any leverage it may possess to further reduce the accounting rate for voice services, where the balance of traffic is in the outbound direction and where the settlement deficit would consequently be reduced by a reduction in the accounting rate. Thus, US Sprint maintains that it makes no sense for any reduction to be limited to

the relatively small portion of service where the balance of traffic is inbound and where the United States would not benefit from a reduction in the accounting rate.[3]

2. TRT/FTC

9. TRT/FTC claims that AT&T has not met its burden of proof to demonstrate by creditable evidence that granting the requested waiver would be in the public interest.[4] TRT/FTC states that AT&T ignores the requirements set forth in the Commission's ISP that petitions requesting waiver must include a projection of the revenue effect on the proponent carrier and a projection of the revenue effect on the U.S. industry overall.

10. In particular, TRT/FTC notes that U.S. collection rates of AT&T and TRT/FTC for packet service to the United Kingdom are $8.00 per connect hour and $10.00 per kilosegment. The rates of Sprint International and Western Union International, Inc. are $10.00 per connect hour and $12.00 per kilosegment. TRT/FTC notes that in the United Kingdom, BTI charges 7.00 pounds, or $13.00 per kilosegment.[5] Moreover, TRT/FTC states that the current accounting rate of 3.32 SDR is accordingly well below the collection rates in both countries. TRT/FTC concludes that the 1.66 SDR payout per connect hour and per kilosegment to the terminating carrier or administration required at present is just a small fraction of the applicable collection rates in both countries and clearly does not present a barrier to the implementation of justified collection rate reductions.

11. TRT/FTC claims that, on the other hand, AT&T's proposed settlement rate structure would be dramatically below applicable collection rates. The proposed per kilosegment accounting rate, when restated in the present dual rate structure using the ratio of connect hours to kilosegments for TRT/FTC's traffic with BTI, would equate to only $3.33 per connect hour and $3.33 per kilosegment. Moreover, TRT/FTC states that BTI's proposed payment of the equivalent of $1.665 per connect hour and $1.665 per kilosegment to U.S. carriers for their part in the international transmission plus termination on a U.S. packet network, would not even cover the tariffed charges to other U.S. international carriers for domestic termination. TRT/FTC notes that, in this regard, Sprint International's domestic termination charges to other carriers for U.K.-originated packet traffic are $2.00 per connect hour and $2.00 per kilosegment of data transmitted. TRT/FTC submits that before the Commission may grant AT&T's petition for waiver, and implicitly finds that the lower accounting rate proposed is justified by costs, it must, as a matter of logic and fairness to other U.S. international packet carriers, first investigate the lawfulness of Sprint International's domestic network termination rates to determine whether they are excessive in relation to costs.[6]

12. Further, TRT/FTC argues that the structural change proposed by AT&T (no compensation for connect hours of usage) would inequitably impact United States industry and United States users.[7] TRT/FTC states that although the amount owing to BTI by U.S. carriers for the termination of U.S. originated calls in the United Kingdom would be reduced, there would be a significantly larger reduction in the amount owing by BTI to U.S. carriers for the termination of U.K. originated calls in the United States because there is significantly more packet traffic transmitted from the United Kingdom than is transmitted from the United States to the United Kingdom. Moreover, TRT/FTC states that because of differing usage patterns, packet data is transmitted on average at higher speeds from the United States to the United Kingdom than it is transmitted from the United Kingdom to the United States.[8] TRT/FTC claims that the proposed structural change would thus result in a 28.6% reduction in BTI's payments to United States carriers for United Kingdom originated traffic terminating in the United States, but in only a 24.4% reduction in the payments of United States carriers to BTI for United States originated traffic terminating in the United Kingdom. TRT/FTC states that, as a result, the proposed structural change would thus significantly benefit the United Kingdom at the expense of the United States, even if the traffic volumes between the two countries were equal. TRT/FTC notes that based upon its packet traffic with BTI, there are approximately 8.5% more kilosegments transmitted from the United Kingdom to the United States than are transmitted from the United States to the United Kingdom. Therefore, TRT/FTC claims that AT&T's proposal would transfer a substantial part of the available revenues for the service from the United States to the United Kingdom and the proposed settlement change can only result eventually in higher rates to United States users than would otherwise be necessary.

C. AT&T REPLY

13. On August 22, 1990, AT&T filed a reply to the oppositions of US Sprint and TRT/FTC. First, AT&T states that it is a relatively new entrant in the packet switched service market.[9] It adds that, unlike TRT/FTC and US Sprint, AT&T's traffic flow has been relatively balanced with slight fluctuations of the imbalance either way.[10] Further, AT&T maintains that its share of the U.S.-U.K. packet market is minuscule, and thus the proposed changes in the accounting rates would have only a *de minimis* effect on AT&T's revenues.[11] AT&T believes that the new accounting rate will actually result in a net revenue gain to AT&T by affording AT&T greater flexibility to adjust its rate levels and rate structure. AT&T intends to lower its collection rate by eliminating the duration charge upon grant of this petition.

14. AT&T notes that while both TRT/FTC and US Sprint attempt to show that a lower accounting rate will not result in lower collection charges, these arguments are contrary to fact. For example, AT&T notes that reductions in AT&T's accounting rate for packet switched service to the Federal Republic of Germany (FRG) were followed by substantial reductions in AT&T's collection rate. AT&T states that the overall effect to AT&T was a stimulation of traffic and a net revenue increase. Through the rate action proposed here, AT&T forecasts a 20 percent stimulation in volume usage with a concomitant increase in service revenues.[12]

15. In response to TRT/FTC and US Sprint's argument that the public interest is harmed where there is a reduction in the accounting rate for a service whose traffic flows are predominantly inbound, AT&T notes that the Bureau has already rejected this view in a separate proceeding.[13] AT&T adds that the Commission has held that the ISP is designed to protect U.S. ratepayers, not individual carriers. AT&T maintains that TRT/FTC and US Sprint are clamoring for Commission protection to insulate them from market pressure to lower their rates. AT&T states that were TRT/FTC and US Sprint to adopt the proposed accounting rate structure, they may make up any lost inbound revenue by pricing more competitively outbound.

16. In response to TRT/FTC's argument regarding the disparity in the ratio of connect hours and kilosegments transmitted from the United Kingdom to the United States,[14] AT&T states that TRT/FTC omits an important and relevant detail from its analysis -- that the cost of providing packet switch data service is determined by the volume of the data, *i.e.*, the number of kilosegments transmitted. Further, AT&T notes that the packet switch's capacity and the available bandwidth on an international facility are only consumed when data is transmitted. AT&T maintains that this is even more true today with the availability of international high speed digital facilities (operating at 64 kilobit per second (kbps)) at approximately the same cost as low speed analog facilities (9.6 kbps). AT&T adds that high speed facilities can support a significantly greater number of logical channels (simultaneous calls) than low speed facilities. Hence, AT&T asserts that the length of time a logical channel is in use (*i.e.*, call duration) is immaterial to network availability or cost, because it is only data volume that actually utilizes the capacity of the network and generates cost.[15]

17. AT&T alleges that TRT/FTC's arguments that the proposed new accounting rates are not cost-based are also without merit. AT&T notes that while TRT/FTC suggests that the proposed structure would be insufficient to cover the costs to terminate its traffic, TRT/FTC makes no claim regarding AT&T's costs. AT&T notes that the costs of delivery experienced by TRT/FTC are in part a reliance on another carrier to deliver traffic domestically.[16] AT&T states that, by comparison, AT&T delivers its packet switched services[17] using its own domestic network, at significantly lower cost. AT&T claims that TRT/FTC's evidence concerning costs it incurs in the provision of its services is not relevant to the Commission's evaluation of AT&T's Petition and should be rejected.

18. Finally, AT&T asserts that the allegations made by US Sprint and TRT/FTC regarding whipsawing by the foreign correspondent are unfounded. AT&T states that BTI has not attempted to coerce AT&T by threatening to terminate its relationship with AT&T. Moreover, AT&T states that the mere fact that AT&T has agreed to institute a new settlement structure with BTI does not in any way affect the flow of return traffic that is currently routed by BTI over TRT/FTC or US Sprint facilities. AT&T argues that no arbitrary division of traffic can occur because AT&T's international packet network is not interconnected with those of other international U.S. carriers. AT&T notes that, as a result, BTI cannot transmit packet traffic destined to another U.S. carrier via the lower cost AT&T route. AT&T states that its agreement to a new accounting rate structure is solely grounded on AT&T's independent evaluation of the benefits of a lower accounting rate which will increase AT&T's pricing flexibility and consequently its profitability.

II. DISCUSSION

19. We find below that AT&T has met its burden of demonstrating that the proposed reduction in the U.S.-U.K. packet switch accounting rate is in the U.S. public interest. Therefore, we grant the AT&T petition for an accounting rate of 3.5 SDRs per kilosegment, divided 50-50, effective May 1, 1990, for international direct packet switched service to and from the United Kingdom.[18]

20. For more than 50 years the Commission has regulated U.S. carrier participation in international accounting and settlement arrangements.[19] The Commission's regulation under the ISP has traditionally focused on preventing foreign correspondents from obtaining unduly favorable terms and conditions in their relations with U.S. carriers, to the detriment of U.S. carriers, and, more important, to the detriment of U.S. ratepayers.[20] In its 1980 decision, *Uniform Settlements*, the Commission reaffirmed the traditional view that the public interest is served by a policy requiring uniform settlement arrangements for international record carriers (IRCs) when more than one carrier provides the same or similar service to a particular foreign point.[21]

21. In *Uniform Settlements*, the Commission recognized, however, that deviations from uniform settlement arrangements may serve the public interest.[22] Indeed, in an effort to encourage entry by new competitors, lower prices, and greater innovation in the provision of international telecommunications services, the Commission stated that it would consider requests for waiver of the uniformity requirement. The Commission stated that it would consider a variety of factors, including, but not limited to, the possibility of lower collection rates, improved services and increased competition in determining whether to grant a petition requesting a waiver of the Commission's uniformity requirement. The Commission concluded that waiver requests would be considered on a case-by-case basis and that, in the grant of a waiver of the ISP, each of these factors alone could support a conclusion that a waiver would provide overall benefits to the public and should be granted.

22. In the last several years, the Commission has begun to focus on the absolute level of accounting rates and the potential adverse effect of the high level of international accounting rates on U.S. consumers. In this context, a Common Carrier Bureau report to the Commission in 1988 noted that high international accounting rates may raise the cost, and consequently, the price of international telecommunications services originating and terminating in the United States.[23] This Bureau report added that the price of international telecommunications services is an important determinant of demand, that accounting rates have not kept pace with reductions in international telecommunications facilities costs, and that high prices for telecommunications services may create a substantial loss in economic efficiency and a further decline in consumer welfare both in the United States and abroad. As a result, the Bureau report concluded that the Commission and U.S. carriers should continue to work with our foreign colleagues to promote changes that would bring the price of telecommunications services closer to costs, and that such changes would benefit both U.S. and foreign consumers and would lead to more efficient use of carrier facilities.

23. In the present case, the parties who oppose AT&T's proposed reduction in the U.S.-U.K. packet switched accounting rate raise concern that, because of differences in traffic patterns to and from the United States (greater inbound than outbound traffic and technical differences in transmission speeds), the benefits of the proposed reduction in the accounting rate will generally inure to the foreign correspondent, and, conversely, negatively impact the U.S. industry overall. We disagree. The best available evidence suggests that packet switched communications service traffic between the United States and the United

Kingdom should grow and that the proposed change in the accounting rate would enable any affected carrier to lower the collection rates it charges, thus further stimulating traffic and revenues.[24] Indeed, AT&T explicitly states that it intends to lower its collection rate by eliminating the duration charge upon grant of this petition and that, through the rate action proposed in this waiver petition, it forecasts a 20 percent stimulation in volume usage with a concomitant increase in service revenues.[25]

24. In addition, while TRT/FTC asserts that AT&T may currently be violating the ISP by settling accounts for packet switched services between the U.S. and the U.K in U.S. dollars, we note that AT&T's proposed reduction in the U.S.-U.K. packet switched accounting rate involves a change in the monetary unit from U.S. dollars to SDRs. Conversion of the monetary unit used to settle accounts falls within the scope of waiver requests under the ISP's pre-existing[26] and present rules.[27] Moreover, while AT&T's proposed conversion from U.S. dollars to SDRs shifts the exchange risk on to the U.S. carrier, a grant of AT&T's proposed conversion to SDRs will make AT&T's settlement rate arrangement uniform with other U.S. record carriers, including TRT/FTC and US Sprint, who currently settle their accounts for packet switched communications services between the United States and the United Kingdom in SDRs, and is otherwise consistent with the International Telecommunication Regulations.[28] Therefore, TRT/FTC's assertion does not serve as a basis for denying a request for waiver of the ISP.

25. Finally, while TRT/FTC and US Sprint allege that U.S. carriers are being whipsawed, we find no evidence to support their allegations. Indeed, AT&T states that changes in the method of allocating return traffic among U.S. carriers were not included in the negotiations leading to the proposed accounting rates. Since AT&T's packet network is not interconnected with those of other international record carriers, we find no evidence to support a claim that there has been an attempt at whipsawing, through, for example, an arbitrary reallocation of return traffic. Further, we find no evidence to support a claim that there has been an attempt by BTI to secure other special concessions from AT&T in the settlement arrangement through any measures which would indicate whipsawing.[29]

III. ORDERING CLAUSES

26. Accordingly, IT IS ORDERED that the petition for waiver of the International Settlements Policy filed by AT&T, File No. USP-90-(W)-112, to permit a change in the accounting rates for packet switched communications service between the AT&T in the United States and BTI in the United Kingdom IS GRANTED.

27. IT IS FURTHER ORDERED that the oppositions of US Sprint and TRT/FTC are DENIED.

28. This Order is issued under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] AT&T added that, based on their traffic estimates for 1990, the current accounting rate of $4.00 per connect hour and $4.00 per kilosegment equates to an accounting rate of 3.7 SDRs per kilosegment, assuming an average of $1.39/SDR. Thus, the proposed accounting rate change to 3.5 SDRs is equivalent to a reduction of 0.2 SDRs from the current rate. *See* Letter from Judy Arenstein, Division Manager, Federal Regulation, AT&T to Michael A. Mandigo, Common Carrier Bureau, FCC (December 19, 1990).

[2] As a result, the Chief, International Facilities Division, Common Carrier Bureau, sent a letter to AT&T to inform AT&T that pursuant to paragraph 48 of the Commission's ISP, *Implementation and Scope of Uniform Settlements Policy for Parallel International Routes*, 51 Fed. Reg. 4736 (released January 30, 1986)(hereinafter *International Settlements*); *on recon.* 2 FCC Rcd 1118 (1987), *further recon.* 3 FCC Rcd 1614 (1988), AT&T must await formal action by the Commission before it can legally implement the new accounting rate for this service. *See* Letter from George S. Li, Chief, International Facilities Division, FCC, to Marisela S. Ross, Attorney, AT&T (August 9, 1990).

[3] US Sprint adds that the U.S.-U.K. accounting rate for International Message Telephone Service (IMTS) has not been lowered since 1982.

[4] Moreover, TRT/FTC suggests that AT&T may currently be in violation of the ISP. TRT/FTC notes that AT&T states that the current accounting rate between the United States and the United Kingdom is $4.00. TRT/FTC further notes that the current accounting rate between BTI and the United States is 3.32 SDR per connect hour and kilosegment, not $4.00. TRT/FTC states that although 3.32 SDR would equal $4.00 using the nominal SDR to U.S. dollar conversion rate of 1.2064, settlements are made using current, not nominal, currency conversion rates. TRT/FTC notes that the current SDR to U.S. dollar conversion rate, as of August 6, 1990, is 1.369. Thus, TRT/FTC claims that using this conversion rate, 3.32 SDR is equal to $4.545. TRT/FTC states that the Commission has held that the ISP's rule of uniformity requires uniform currency and conversion rates as well as accounting rates and divisions. *Citing International Settlements.*

[5] TRT/FTC adds that as of March, 1985, BTI's collection rates were 6.00 pounds per connect hour and 3.50 pounds per kilosegment. TRT/FTC notes that when BTI changed its collection rate structure to a kilosegment only basis, it doubled its kilosegment rate from 3.50 pounds to 7.00 pounds so that it would not incur a loss of revenues.

[6] TRT/FTC argues that BTI's proposed payment of $1.665 per connect hour and per kilosegment to U.S. carriers for international transmission plus domestic network termination and Sprint International's tariff of $2.00 per connect hour and per kilosegment for domestic termination alone, cannot both be cost-based.

[7] TRT/FTC states that AT&T has failed to provide the traffic data which is necessary to determine whether, or to what extent, the net impact of the proposed change will be to increase or decrease the division of payments for packet calls.

[8] TRT/FTC states that packet services from the United Kingdom to the United States are used to a larger extent for data base access, while packet services from the United States to the United Kingdom are used to a larger extent for higher speed data transmission. TRT/FTC claims that based on TRT/FTC's traffic with BTI, which it believes is representative of the industry, there are .4782 connect hours for each kilosegment of data transmitted from the United Kingdom to the United States, while there are only .3947 connect hours for each kilosegment of data transmitted from the United States to the United Kingdom.

[9] AT&T began its packet service with the United Kingdom in 1986. AT&T states that the $4.00 rate per connect hour and kilosegment was filed on January 6, 1988. AT&T states that BTI informed AT&T that this accounting rate was the effective rate between BTI and the other carriers.

[10] AT&T notes that in 1989, for example, the overall direction of traffic was inbound, resulting in a net settlement payment to AT&T of $15,918. AT&T adds that year-to-date data for 1990 reveal that the trend has reversed, with a resulting small net settlement payment to BTI.

[11] AT&T notes that, on an annualized basis, for 1990, the net impact on AT&T's settlement payments to BTI would be less than $10,000, hardly the "substantial" transfer of revenues alleged by TRT/FTC. Moreover, AT&T maintains that this increase in settlement payment will be more that offset by the forecasted stimulation of U.S.-billed traffic as a result of lower collection rates AT&T proposes to implement.

[12] AT&T adds that because connect time revenue represents only 17 percent of AT&T's total revenue for U.S.-U.K. packet services, the projected stimulation in volume will have a significant salutary effect on AT&T's net revenues.

[13] *Citing* AT&T, Petition for Waiver of the ISP to Reduce the Accounting Rate for International Direct Packet Switched Service Between the United States and the Federal Republic of Germany, 4 FCC Rcd 1195 (Com.Car.Bur. 1989)(hereinafter *FRG Packet Order), on recon.*, 4 FCC Rcd 6602 (Com.Car.Bur. 1989).

[14] AT&T distinguishes its experience of providing packet service from TRT/FTC. AT&T states that its packet service is primarily used for business-to-business communications interconnecting into the network at high speeds using X.25 protocol, not data base access by the U.K. user using dial-up asynchronous access. AT&T claims that the disparity of connect hours to kilosegments is likely attributable to BTI's pricing structure which charges a customer only for the volume of data transmitted, not the call duration, and thereby creating an incentive for some customers to maintain a call for a longer period. AT&T adds that, as TRT/FTC admits, approximately 8.5% more kilosegments are transmitted from the United Kingdom, and if TRT/FTC adopted the new structure, its inbound net settlement would not disappear.

[15] AT&T notes that logical channels are provisioned in software and do not consume significant packet switch resources.

[16] AT&T further notes that TRT/FTC's argument was considered and rejected by the Bureau in *FRG Packet Order*, 4 FCC Rcd at 6607.

[17] AT&T states that TRT/FTC's request that the Commission investigate the lawfulness of US Sprint International domestic network termination rates before granting AT&T's Petition should be denied. AT&T asserts that the level of another carrier's domestic rates is not a factor to be considered by the Commission in evaluating a Petition for Waiver of the ISP.

[18] While we review AT&T's waiver request in this case under the ISP rules in effect when filed, we note that under the Commission's rules established in CC Docket 90-337, 47 C.F.R. § 64.1001, Regulation of International Accounting Rates, *Report and Order*, 6 FCC Rcd 3552 (1991), AT&T's proposed change in the U.S.-U.K. packet accounting rate would be fully consistent with the Commission's existing waiver approach. Specifically, as a change involving a lower, more cost-based rate other than a simple mathematical reduction in the accounting rate (AT&T's proposal involves modifying the settlement arrangement (from U.S. dollars to SDRs) and involves a change in the accounting method (removing the duration charge)), AT&T's proposed rate reduction would fall under the 21-day waiver review procedure. Further, AT&T has indicated that it will reduce its collection rate for this service upon implementation of the new rate. Therefore, AT&T's proposal would meet the Commission's proposed criteria of a lower, more cost-based accounting rate and a firm carrier commitment to reduce the collection rate. Finally, AT&T's proposal addresses the Commission's other requirements in its rules in light of the fact that AT&T has not bargained for changes in the method of return traffic among U.S. carriers and that AT&T does not enjoy an exclusive arrangement for the provision of this service.

[19] *See* Mackay Radio and Telegraph Company, Inc., 2 FCC 592 (1936), *aff'd by the Commission en banc*, 4 :FCC 150 (1937), *aff'd sub nom.* Mackay Radio and Telegraph Co. v. F.C.C., 97 F.2d 641 (D.C. Cir. 1938); TRT Telecommunications Corp., 46 FCC 2d 1042 (1974); Uniform Settlement Rates on Parallel International Communications Routes, 84 FCC 2d 121 (1980) (hereinafter *Uniform Settlements)*; *International Settlements*; Regulation of International Accounting Rates, CC Docket 90-337, 5 FCC Rcd 4948 (1990), *Report and Order*, FCC 91-157, *Further Notice of Proposed Rule Making*, FCC 91-158 (1991).

[20] The Commission coined the term "whipsawing" in *Mackay*, stating that:

> To expect the telegraph administration to play the competing companies against each other is simply to expect that the administration will be headed by good businessmen, loyal to their national interests. To rely upon companies which are bitter competitors not to make concessions to the administration which controls all outgoing radio-telegraph traffic is to provide an exceedingly tenuous basis upon which to rest the public interest.

MacKay Radio, 2 FCC at 599.

[21] The Commission concluded that its policy requires carriers providing the same service to the same foreign point to have uniform accounting rates (rate per minute of service that is negotiated and shared by initiating and terminating telecommunications administrations), settlement rates (the currency conversion stipulated in the operating agreement, which is usually Gold Francs (GFs), Special Drawing Rights (SDRs), or U.S. dollars), and division of tolls (the percentage of the accounting rate to be given each administration, which is usually 50-50) with a given PTT. *Uniform Settlements*, 84 FCC 2d at 128.

[22] On reconsideration of *International Settlements*, the Commission changed the name of its policy from the Uniform Settlements Policy to the International Settlements Policy because:

> . . . uniformity is not an end in itself. Our objectives are to ensure that U.S. entities are treated fairly and that American consumers receive the benefits that result from the provision of international services on a competitive basis. Departures from uniformity are permissible if the particular departure does not conflict with these objectives. We have accordingly decided to use the term "international settlements policy" in this Order.

International Settlements, 2 FCC Rcd at 1118.

[23] *See* "International Accounting Rates and the Balance of Payments Deficit in Telecommunications Services," Report of the Common Carrier Bureau of the FCC to the Commission, December 12, 1988. *See also* Kenneth B. Stanley, "Balance of Payments Deficit in International Telecommunications Services," Industry Analysis Division, FCC (December 12, 1988).

[24] *See FRG Packet Order*, *supra* note 13, wherein we stated that we believed that packet switched communications service between the U.S. and the FRG should grow, particularly if reductions in the accounting rate lead to reductions in collection rates on both sides of the Atlantic. Moreover, we noted that should the reduction in the accounting rate lead to reductions in collection rates for packet switched service, we believe that there should be no appreciable negative impact on AT&T's revenues or on the U.S. telecommunications industry overall. *FRG Packet Order* at 1196. No evidence has been presented in this proceeding to demonstrate that these earlier assertions have proved to be incorrect.

[25] Further, regarding TRT/FTC's argument that the proposed change in the accounting rate will be insufficient to cover its cost of domestic termination, we have already noted that TRT/FTC could simply choose to discontinue receiving such terminating traffic. *See* Petitions for Waiver of the International Settlements Policy to Reduce the Accounting Rate for International Direct Telex Service Between the United States and the CEPT Countries, 3 FCC Rcd 52, n. 10 (Com. Car. Bur. 1988); *FRG Packet Reconsideration Order*, 4 FCC Rcd at 6607.

Additionally, we disagree with TRT/FTC that the Commission must first investigate the lawfulness of Sprint International's domestic termination rates before the Commission may grant AT&T's petition for waiver, *see* TRT/FTC Comments, *supra* para 12. AT&T states that it delivers its packet switched services using its own domestic network, at significantly lower costs. Therefore, we believe that AT&T is correct that TRT/FTC's argument concerning the lawfulness of Sprint International's domestic rates is irrelevant to AT&T's costs and, therefore, not relevant to our consideration of AT&T's waiver petition.

[26] *International Settlements* at para. 42.

[27] *See* 47 C.F.R. §§ 43.51(d) and 64.1001.

[28] *See* Article 6.3, WATTC-88, Melbourne.

[29] In regard to US Sprint's argument that a reduction in accounting rate between the U.S. and the U.K. being lowered as part of an overall settlement between the two countries would be in the U.S. interest, *see* US Sprint's Comments, para. 8 *supra*, we note that since AT&T's filing in July, 1990, a number of U.S. carriers, including US Sprint, have filed petitions for waiver of the Commission's ISP for reductions in the U.S.-U.K. IMTS accounting rate. *See* File Nos. USP-91-(N)-001; USP-91-(N)-004; and USP-91-(N)-005; USP-91-(N)-057; USP-91-(N)-060; USP-91-(N)-073; and USP-91-(N)-094. Further, a number of U.S. carriers have filed petitions of waiver of the Commission's ISP for reductions in the U.S.-U.K telex accounting rate. *See* File Nos. USP-91-(W)-080; USP-91-(W)-106; and USP-91-(W)-108.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-28

In the Matter of

Amendment of Section 73.202(b), RM-7584
Table of Allotments,
FM Broadcast Stations.
(Abilene and Colorado City,
Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 13, 1992; Released: April 22, 1992

By the Acting Chief, Allocations Branch:

1. At the request of Sure Broadcasting, Inc. ("petitioner"), licensee of Station KHXS-FM, Channel 292A, Abilene, Texas, the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 6 FCC Rcd 1279 (1991), proposing the substitution of Channel 292C2 for Channel 292A at Abilene and the modification of Station KHXS-FM's license to specify operation on the higher class channel. An *Order to Show Cause* was issued to James G. Baum ("Baum"), licensee of Station KAUM-FM, Colorado City, Texas, proposing the substitution of Channel 291A for Channel 292A and the modification of Station KAUM-FM's license to specify operation on the alternate Class A frequency, to accommodate the Abilene substitution. Petitioner filed comments reiterating its intention to apply for Channel 292C2, if allotted to Abilene. No other comments were received.

2. We believe the public interest would be served by substituting Channel 292C2 for Channel 292A at Abilene because it would enable Station KHXS-FM to expand its coverage area. Baum did not file comments in response to the *Order to Show Cause* and is thus deemed to consent to the modification of Station KAUM-FM's license to specify operation on Channel 291A in lieu of its present Channel 292A. *See* Section 1.87 of the Commission's Rules.[1] As proposed, we will modify petitioner's license for Station KHXS-FM to specify operation on Channel 292C2 at Abilene, and Baum's license for Station KAUM-FM to specify operation on Channel 291A at Colorado City, Texas, in accordance with Section 1.420(g) of the Commission's Rules.

3. Channel 292C2 can be allotted to Abilene and Channel 291A can be allotted to Colorado City in compliance with the Commission's minimum distance separation requirements at the licensed sites of Stations KHXS-FM and KAUM-FM, respectively.[2] Since Colorado City is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence of the Mexican government has been obtained for this allotment.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 5, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Abilene, Texas	223C2, 264C, 286C1, 292C2, 300C1
Colorado City, Texas	291A

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Sure Broadcasting, Inc. for Station KHXS-FM, Abilene, Texas, IS MODIFIED to specify operation on Channel 292C2, in lieu of Channel 292A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Sure Broadcasting, licensee of Station KHXS-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of James G. Baum, for Station KAUM-FM, Colorado City, Texas, IS MODIFIED to specify operation on Channel 291A in lieu of Channel 292A, subject to the following conditions:

[1] Petitioner stated in its petition for rule making that it would reimburse the licensee of Station KAUM-FM for reasonable costs associated with the change in channel at Colorado City, Texas.

[2] The coordinates for Channel 292C2 at Abilene, Texas, are North Latitude 32-28-34 and West Longitude 99-42-22. The coordinates for Channel 291A at Colorado City, Texas, are North Latitude 32-23-15 and West Longitude 100-53-33.

(a) Nothing contained herein shall be construed as authorizing any change in Station KAUM-FM's license, BLH-830419AM, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-830419AM, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

8. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee of Station KAUM-FM, as follows: James G. Baum, P.O. Box 990, Colorado City, Texas 79512.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
Springtown Educational
Broadcasting Foundation

Licensee of Radio Station
KYQX(FM), Weatherford, TX

for a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: April 20, 1992; Released: April 24, 1992

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration (1) a $5,000 Notice of Apparent Liability (NAL)[1] issued April 15, 1991, to Springtown Educational Broadcasting Foundation (Springtown), licensee of Noncommercial Radio Station KYQX(FM), Weatherford, Texas; and (2) the licensee's August 26, 1991, response to the NAL and to a subsequent letter of inquiry.

2. The NAL was issued for apparent violations of Section 399B of the Communications Act of 1934, as amended, and Section 73.503(d) of the Commission's rules, which prohibit noncommercial stations from airing "advertisements." Section 399B defines advertisements as announcements that promote the sale of goods and services of for-profit entities in exchange for remuneration.[2] Although contributors of funds may receive on-air acknowledgments, the Commission has stated that such acknowledgments may be made "for identification purposes only and should not promote the contributor's products, services, or company." Accordingly, such announcements may not contain comparative or qualitative descriptions, price information, calls to action, or inducements to buy, sell, rent or lease. *See Public Notice*, 7 FCC Rcd 827 (1986).

3. The licensee concedes that the announcements in question (see attached transcripts) exceed the identification-only purpose of underwriting acknowledgments by generally promoting the sale of goods and/or services of for-profit entities. Springtown's president, Wesley Yeager, has stated that the transgressions that occurred prior to our November 28, 1990, letter of inquiry resulted from lack of familiarity with our rules and statutes in this regard. The more recent transgressions (April 16, 1991), he claims, were due to his inability to ensure, from his location outside of Weatherford, that those under his supervision at KYQX adhered to his underwriting guidelines; he states his intent to relocate to Weatherford to personally oversee compliance.

4. In issuing the NAL, we rejected Yeager's excuse that he was unaware of the relevant prohibitions. We also reject the excuse that Yeager, despite his best absentee efforts, was unable to prevent the broadcast of advertisements after he was made aware of the policies, rules, and statutes that govern underwriting announcements on noncommercial stations. Neither ignorance of the rules nor reliance on employees to follow them absolves a licensee of responsibility when violations occur. *Triad Broadcasting Co.*, 96 FCC 2d 1235 (1984); *Economic Opportunity Board of Clark County*, 6 FCC Rcd 2034 (MMB 1991).

5. Springtown asks that the forfeiture be rescinded or reduced for financial hardship, evidenced by its income statement showing losses for the 11-month period ended July 31, 1991. At least, the licensee urges, the Commission should reduce the forfeiture amount to $2,500, the base amount listed in our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*, for first-time violations of the underwriting requirements for noncommercial stations.

6. We do not believe that a reduction or rescission is appropriate under the circumstances. Springtown has failed to submit a profit and loss statement prepared under generally accepted accounting principles as required (see paragraph I(B) of the Attachment to the NAL) to support the claim of inability to pay. Moreover, the violations at issue here were repeated not only after our November 28, 1990, letter of inquiry was mailed to KYQX but also after our NAL was mailed to the station on April 5, 1991. In each correspondence we clearly outlined the underwriting rules and policies applicable to noncommercial stations. We therefore do not consider the various KYQX violations as a "first-time" transgression. We will, however, refrain from increasing the forfeiture for the advertisements apparently broadcast between the date of the NAL and the date of this Memorandum Opinion and Order.

7. Finally, Springtown has asked for a payment schedule in the event the full NAL amount is affirmed. We deny this request as well. The $5,000 forfeiture is relatively lenient under all the circumstances, and by the time this payment is due, 30 days from the date of this Order, the licensee will have had a sufficiently generous payment "schedule" by virtue of our delay in imposing it.

8. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED, that Springtown Educational Broadcasting Foundation, licensee of Radio Station KYQX(FM), Weatherford, TX, FORFEIT to the United States the sum of five thousand dollars ($5,000) for repeated violations of Section 399B of the Communications Act and Section 73.503(d) of the Commission's rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the li-

[1] *Springtown Educ. Broadcasting Found.*, 6 FCC Rcd 2009 (MMB 1991).
[2] 47 U.S.C. Section 399b.

censee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

ATTACHMENTS

KYQX(FM), Weatherford, TX **5/10/90**

The seven o'clock news report is made possible through the support of Jerry's GM Transportation Center. They're located at 4100 Fort Worth Highway in Weatherford. Featuring a complete line of GM products including Chevy trucks. Jerry's GM Transportation Center is also the home of the North Texas Chevy 5000, where with every test drive you'll receive a pair of tickets to the May 15 Texas Rangers-Detroit Tigers baseball game. Serving the car and truck needs of Parker County for over 20 years, Jerry's GM Transportation Center.

... Weatherford Brake and Front End Shop and Circle T Muffler Shop, at.... Owners John Tehee and Larry Tidwell remind you that you can have your brakes and mufflers checked out at no charge. They also have Kelly tires and shock absorbers. Accepting Visa, Mastercard, and Discovery Card, Weatherford Brake and Front End Shop and Circle T Muffler Shop at 206 Fort Worth Street, Weatherford.

10/12/90

This weather was sponsored by Ben Combs Optical, 808 South Main. At Ben Combs Optical they sell prescriptions as well as duplicate lenses. With one hour service in many cases. Let their family serve your family. Call Ben or Vicky Combs at 599-8581.

This weather is sponsored by Quick Print on the southeast corner of the Square. Quick Print has a public FAX machine, 3 copiers so there's no waiting, and a work station for their customers. It's time to order Christmas cards for business or personal use. They have all styles and sizes. They're open 8:30 a.m. to 5:30 p.m. Monday through Friday. Quick Print on the Square in Weatherford. Give them a call at 594-8121.

... Brought to you by Edward D. Jones and Company Investments at 119 North Main Street in the Professional Building. We are going to be speaking with Kim who works for Kevin Mangum down there at Edward D. Jones. If you... have any questions or would like to make investments of any type, Edward D. Jones are the people to call at 599-8316. Kim, are you there...

4/16/91

... the news at 7:31 was made possible by contributions from the good folks at Nick's Ford Tractor, now reopened on Mineral Wells Highway... the big blue Ford tractors out front signify that the Nicks are back in business. At Nick's Ford Tractor, go by and see Lana and Gregg Wright... they are having their big grand opening this Saturday from 8 until noon, free barbeque until 2 p.m., 11-2 p.m., free barbeque at Nick's Ford Tractor. And register for the free Ecko weed eater.

... also by contributions from Kennedy Sausage at 1318 Clear Lake Road in Weatherford. All of your favorite meat and sausage, all at wholesale prices to the public every day.

... Galbert Pickett Funeral Chapel at 913 North Elm, here to serve your family in their time of need. If you have a question about pre-need burial insurance, call James Plowman at Galbert Pickett Funeral Chapel.

... Nick's Ford Tractor, now reopened on Mineral Wells Highway... having a big grand opening this Saturday and free barbeque, and by Kennedy's Sausage, ... all of your favorite meat and sausage at wholesale prices to the public every day.

First National Bank has been serving Parker County since 1880... surely there's something they can do for you today at First National Bank.

Listen in each day at this time for Health Spot, and Complete Care Medical Supplies in the Century Center Shopping Center is one of the sponsors of Health Spot. They accept medicare and insurance assignments, and let them do all of the paperwork for you. You just go by and tell them what your sick room needs are, home oxygen service, whatever, and they will handle all the paperwork for you and the assignments. Complete Care – they care about you and your needs.

Why have your nails sculptured when you can Lamay them? Call 594-6864 and ask for Ruby and you will receive a complimentary nail care class....

... and sportswear and a complete line of Lamay Nail Care Systems. Why have your nails sculptured when you can Lamay them? Call 594-6864 for a complimentary nail care class. We appreciate the support of Ruby Richards.

... beauty and health care products, and Dermashield, the ultimate skin care protection. Call Ruby at 594-6864 for a free facial and a free skin care class.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 24, 1992

CARRIERS FILE REVISIONS TO THEIR COST ALLOCATION MANUALS

PUBLIC COMMENT INVITED

Several local exchange carriers filed proposed revisions to their cost allocation manuals for the separation of regulated and nonregulated costs for the quarter ended March 31, 1992. Listed below are the names of the carriers that filed revisions and the file number assigned to each revision.

Ameritech Operating Companies	AAD 92-22
Bell Atlantic	AAD 92-23
BellSouth Corporation	AAD 92-24
Cincinnati Bell Telephone Company	AAD 92-25
Lincoln Telephone	AAD 92-26
Nevada Bell	AAD 92-27
NYNEX Telephone Companies	AAD 92-28
Pacific Bell	AAD 92-29
Puerto Rico Telephone Company	AAD 92-30
Rochester Telephone	AAD 92-31
Southern New England Telephone Company	AAD 92-32
Southwestern Bell	AAD 92-33
United Telephone	AAD 92-34
U S West, Inc.	AAD 92-35

In addition, the following companies filed letters stating there were no changes to their CAMS during the quarter ended March 31, 1992:

American Telephone and Telegraph Company
Centel Corporation
GTE

Parties may file comments on the proposed revisions to the cost manuals no later than **May 22, 1992.** Replies should be filed by **June 8, 1992.** Comments should reference the applicable AAD file number listed above. A copy of each pleading should be sent to Tom Petras, FCC, Common Carrier Bureau, 2000 L St., N.W., Room 812, Washington, D.C. 20554 and the Downtown Copy Center (DCC), 1114 21st St., N.W., Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room 2000 L St., N.W., Room 812, Washington, D.C. Copies are also available from DCC.

For further information contact Tom Petras at (202) 634-1861.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-84

In re Applications of

GRADY LYNN and CAROL LYNN d/b/a LYNN BROADCASTING	File No. BPH-891011MJ
EDITH M. GELFAND	File No. BPH-891012MN
JAMAL BROADCASTING, L.P.	File No. BPH-891012MS
Q PRIME, INC.	File No. BPH-891012MT

For Construction Permit for a
New FM Station on Channel 294A
in Mt. Juliet, Tennessee

Appearances

Timothy K. Brady on behalf of Grady Lynn and Carol Lynn d/b/a Lynn Broadcasting; *Lawrence J. Movshin* and *Robert L. Hoggarth* on behalf of Edith M. Gelfand; *David Honig* on behalf of Jamal Broadcasting, L.P.; and *Howard M. Liberman* on behalf of Q. Prime, Inc.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: April 20, 1992; Released: May 1, 1992

1. Eleven applications were designated for comparative hearing to determine who should be awarded this facility in Mt. Juliet, Tennessee. *Hearing Designation Order*, 6 FCC Rcd 2108 (MM Bur. 1991). Four applicants remain. The following issues will be considered in this decision:

1. (a) To determine whether Jamal Broadcasting, L.P. is financially qualified.

(b) To determine whether Jamal Broadcasting, L.P. falsely certified that it was financially qualified.

(c) To determine in light of the evidence on (a) and (b) whether Jamal Broadcasting, L.P. is qualified.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications, if any, should be granted.

2. A prehearing was held on June 19, 1991. Tr. 1-13. Written testimony was exchanged on September 12, 1991. An admissions session was held on September 19, 1991 (Tr. 14-116); oral examination of written testimony was heard on September 25, 1991 (Tr. 117-408) and September 26, 1991. Tr. 409-605. Additional written testimony was exchanged on January 24, 1992 and oral examination of that testimony took place on February 3, 1992. Tr. 606-767. The record was closed on September 26, 1991 and reopened and closed finally on February 3, 1992. Proposed findings and conclusions were filed by Lynn, Gelfand, Jamal, Prime, and Walker on November 8, 1991 and by Lynn and Jamal on February 24, 1992. Replies were filed on December 4, 1991 by Lynn, Jamal, Gelfand, and Walker and by Lynn and Jamal on March 3, 1992.

FINDINGS OF FACT

Issue 1: Whether Jamal is financially qualified and whether it falsely certified its qualifications.

3. Michael Grant, the only general partner in Jamal, originally applied for this facility, on October 12, 1989, as a sole proprietor. Jamal Exh. 1, at 1 and Jamal Exh. 26, at 1. He intended initially to apply as a limited partnership with CVC Capital Corporation as the limited partner. Jamal Exh. 26, at 1. Under their proposed partnership, CVC intended to lend Jamal the money to build the station and operate it. *Id.*, Tr. 641. During the negotiations between Grant and Joerg Klebe, CVC's president, Grant told Klebe about his broadcast knowledge, management background and plans for the station. Jamal Exh. 26, at 1. Klebe was provided on October 4 and 5, 1989 with Grant's financial plan for the station and his personal financial statement. Jamal Exh. 26, at 2. Grant discussed his financial plan with Klebe and following that discussion, on October 6, 1989, Klebe, on behalf of CVC, wrote to Grant and provided reasonable assurance for a loan for Jamal Broadcasting, L.P. Jamal Exh. 26, at 3. It was still intended on that date that CVC would become a limited partner in Jamal. *Id.*

4. Klebe and Grant discussed collateral for the loan and Grant understood that Jamal would have to provide as collateral the partnership's accounts receivable, inventory, equipment, and any other station assets. *Id.* In addition, Grant would have to pledge any personal and real property he owned when the loan was made. *Id.* CVC's Klebe was aware that Grant had no real property at the time the letter was written. Jamal Exh. 26, at 3-4; Jamal Exh. 27, at 4-5. And ownership of real property was not a condition of the loan. Jamal Exh. 27, at 6. Klebe said that the collateral for the loan was discussed when he went over the terms for the loan with Grant. Jamal Exh. 27, at 7. Grant wrote to Klebe on October 6, 1989 and told Klebe that he was willing to provide the required collateral for the loan. Jamal Exh. 26, at 4. On October 7, 1989, Grant concluded that he did not want to have CVC as a partner. *Id.*, at 5. Nevertheless, CVC and Grant assumed that CVC would still provide financing for the Mt. Juliet proposal. On October 9, 1989, Grant told CVC that he estimated that it would cost $27,050 to prosecute the application. *Id.*, at 5-6. Grant intended to pay the prosecution costs himself from his income as the litigation progressed. *Id.*, at 5.

5. On October 10, 1989, Klebe told Grant that, even though CVC was not going to become a partner, CVC would still lend Jamal or Grant $500,000. Jamal Exh. 26,

at 6. However, without CVC participating as a partner, Grant would have to pay CVC $750 for its commitment. *Id.* Grant said he learned later that CVC's loan could not be used for the $15,000 in legal expenses he estimated would be incurred putting the station on the air after a grant was made. *Id.* On October 12, 1989, Grant filed for this facility and on the preceding day, October 11, 1989, CVC sent a letter promising to lend Grant, as an individual applicant, the $500,000. *Id.*, at 7. To meet prosecution expenses, Grant agreed to a monthly payment plan with his counsel and engineer. Jamal Exh. 26, at 7. These payments were agreed to orally and were codified in a memorandum Grant sent to them on October 11, 1989. *Id.*

6. On January 26, 1990, Grant amended his application to change from an individual applicant to a limited partnership. Jamal Exh. 26, at 8. Grant told CVC that he was going to have a limited partner, United Communications, Inc., and Grant asked CVC to reconfirm its willingness to lend to the new partnership. *Id.* On January 19, 1990, CVC told Grant that it would lend to the partnership he was forming with United Communications, Inc. *Id.* Grant amended his application to reflect the new owners and the change in his financial certification. *Id.*

7. Mr. Klebe is the only officer and employee of CVC and its only owner through Transtel, which he also owns. Tr. 630; *Id.* CVC specializes in loans to broadcasters. Tr. 631. Because Klebe believes that the standard of reasonable assurance for broadcast loans varies from time to time, he relies on advice from legal counsel to insure that CVC's promise to a borrower meets FCC standards. Tr. 643-44, 647. Before providing assurance to Jamal, Klebe looked at Jamal's proposal to see if it was viable and he determined that it was one he would finance. Tr. 647-48. When questioned about the provision of legal fees in Jamal's budget, Klebe said that the $15,000 in legal fees would not be covered if they related to obtaining the construction permit. Tr. 653. But he added that legal fees for start-up work could be paid for by the loan. Tr. 654. The $15,000 item listed on Jamal Exh. 18, at 26 is for legal fees "which may not have been covered by capital calls." If those legal fees are for prosecution of the application, they will not be covered by the CVC loan. Tr. 656.

8. Grant pledged to pay $27,050 for obtaining the permit. Tr. 702-03. He originally believed that he could use the loan from CVC Corporation to meet part of that amount and, therefore, he listed it in his budget. Tr. 703. Grant had reached an agreement with his engineer and attorney before October 11, 1989 in which he promised to make payments on the prosecution costs. Tr. 714-15. Grant states he has made the payments. Tr. 715.

Issue 2: Which proposal would, on a comparative basis, best serve the public interest.

Diversification of control of the media of mass communications

Lynn

9. Lynn is a general partnership with two equal partners, Grady and Carolyn Lynn. Lynn Exh. 1, at 1. Lynn and its partners have no interest in the media of mass communications. *Id.*

Gelfand

10. Gelfand is the individual applicant Edith M. Gelfand. Gelfand Exh. 3, at 1. Ms. Gelfand has no interest in the media of mass communications. *Id.*, at 2. Her spouse, however, owns KIQY-FM, Lebanon, Oregon and holds a permit for KKTM-TV, Flagstaff, Arizona. *Id.* Ms. Gelfand maintains she does not participate in their operations. Tr. 450-53.

Jamal

11. Jamal is a limited partnership. Jamal Exh. 7, at 1. The general partner is Michael Grant. *Id.* Grant owns a 25 percent equity interest in Jamal and United Communications, Inc., Jamal's only limited partner, owns a 75 percent equity interest. *Id.*, at 10, 11. Jamal and its partners have no interest in the media of mass communications. Jamal Exh. 2, at 1. Dr. James Freemont, a 12.5 percent stockholder in UCI, owns 50 percent of the equity and is the only limited partner in TFB Associates Limited Partnership. Jamal Exh. 2. TFB owns 33 percent of T. Wood & Associates, Inc., the permittee of a new FM station licensed to Hogansville, Georgia. *Id.* Fremont has a 16.5 percent interest in the licensee through his ownership of TFB. *Id.*

Prime

12. Prime is a corporation owned in equal shares by Clifford N. Burnstein and Peter D. Mensch. Prime Exh. 1. They are also Prime's officers and directors. *Id.* Burnstein and Mensch are officers and directors and equal owners of Ionosphere Broadcasting Corporation, Stratosphere Broadcasting Corporation, Troposphere Broadcasting Corporation and Atmosphere Broadcasting Corporation. Prime Exh. 3, at 1. The corporations are the general partners in limited partnerships having the same names. Ionosphere Limited Partnership holds a construction permit for an FM station in Woodlake, California. Stratosphere Limited Partnership holds a construction permit for an FM broadcast station in Los Osos-Baywood Park, California. Troposphere Limited Partnership holds a construction permit for an FM station in Greenfield, California; and Atmosphere owns all the stock in Double D Broadcasting Company, the licensee of KRAB-FM, Green Acres, California. *Id.* Burnstein and Mensch are the only limited partners in each entity and the only officers and directors in Double D Broadcasting. *Id.*

Integration of ownership into management

Lynn

13. Both Grady Lynn and his spouse, Carolyn Lynn, the only owners and equal general partners of Lynn, propose to work full time, 40 hours per week, at the station. Lynn Exh. 2, at 1. Grady Lynn will be the general manager. *Id.* He will supervise all phases of the station operation. *Id.* Mr. Lynn will quit his current employment. *Id.* Carolyn Lynn will supervise all aspects of the station's business and financial affairs, establish financial policy and supervise sales. *Id.* She will also supervise various matters relating to programming and equal employment opportunity. *Id.*

14. Ms. Lynn owns Batteries Unlimited, Inc. which now takes 15 hours per week of her time. *Id.* In her written testimony she stated that she will sell this business if a grant is made to Lynn. But at the hearing she said she will "probably" sell the business. Tr. 403. She has owned the business for many years and has made no plans for its sale. *Id.*; Tr. 404.

15. Mr. Lynn decided to locate a frequency in the Mt. Juliet area. Tr. 366. He retained the engineer, the attorney for the process of obtaining the frequency, and established the public file at his business address. Tr. 366, 418. Mr. Lynn also located the antenna site and arranged for the site with the land owner. Tr. 419-20. Despite Ms. Lynn's claim that she will oversee EEO compliance, it was Mr. Lynn who designated the EEO recruitment sources listed in Lynn's application. Tr. 372-73. Lynn's financial certification was based on Mr. Lynn's personal financial statement. Tr. 376. Mr. Lynn said his wife would work as the office manager/business manager at the station. Tr. 386. He referred to her role as being business manager and bookkeeper. *Id.* When the Lynns operated a previous business together, the Battery Shop, Ms. Lynn was the business manager. Tr. 420-21.

16. The Lynns have lived in Mt. Juliet since 1976. Lynn Exh. 2, at 1-2. The Lynns also lived in Nashville from 1970 to 1976; Nashville is within the primary service area of the proposed station. Lynn Exh. 2, at 2. Mr. Lynn joined the Mt. Juliet Masonic Lodge in 1976 and the Big Brothers in 1976, established an orphanage in Mt. Juliet between 1984 and 1988, established a senior citizens organization for Mt. Juliet in 1977, served on the board of the Senior Citizens Organization and Center from 1978 to 1989, from 1978 to 1988 raised funds and donated equipment for the Mt. Juliet Fire Department and Rescue Squad, served on a government committee in 1987, from 1977-85 served on the Mt. Juliet City Planning Commission, served as an elected local official from 1983-1987, donated and helped establish a local park in 1984, founded the Mt. Juliet Theatre in 1987, donated land for the Mt. Juliet Library between 1983 to 1987, volunteered at a local school in 1988-89, provided emergency assistance to the police in 1983, member of Chamber of Commerce since 1978, and charter member of the Mt. Juliet Rotary Club since January 1990. Lynn Exh. 2, at 3-9.

17. Ms. Lynn has been a member of the Business and Professional Womens Association of Mt. Juliet since 1982, a member of a political party organization during 1983-84, raised money for local charities since 1986, participated in fundraising for Big Brothers since 1976, joined her spouse in establishing the orphanage between 1984 and 1987, joined her spouse in establishing a senior citizens organization between 1977 and 1984, raised funds for the Mt. Juliet Fire Department and Rescue Squad, assisted the city government in various projects between 1983-85, donated land for a park and library between 1985 and 1987, and founded the Mt. Juliet Theatre in 1987. Lynn Exh. 3, at 2-5. Ms. Lynn is female. *Id.*, at 2.

Gelfand

18. Gelfand is an individual applicant. Gelfand Exh. 3, at 1. She proposes to work full time, 40 hours per week, as the general manager of the station. Gelfand Exh. 3. Gelfand will oversee construction and be in charge of all aspects of the station's operation. *Id.*

19. Gelfand will curtail her other business and professional activities in order to carry out her integration proposal. Gelfand Exh. 3. While Ms. Gelfand is a lawyer, she no longer has an active practice. Tr. 437. Along with her spouse, Ms. Gelfand has owned a music publishing company in Nashville since 1981. Gelfand Exh. 3, at 2. She also owns real estate with her spouse. Tr. 444. Ms. Gelfand relies on her spouse for support and she has used funds from a joint account to fund her proposal for this station. Tr. 464. Ms. Gelfand said she intends to transfer money from a personal account to the joint account but she has not done so. *Id.* She has hired the same lawyer and technical consultant as her spouse has. Tr. 441-42. Ms. Gelfand has relied on her spouse for general advice because of his greater experience in communications and she anticipates discussing the station with him. Tr. 446-50. In her application Gelfand represented that she has no material business interests in common with her spouse and that she does not participate in any way with his media interests. Nevertheless, she is familiar with the operation of her spouse's radio station; she knows the format, who the general manager is, whether the station is profitable; and she knows why her spouse has not constructed television station KKTM(TV). Tr. 452-53. She also is consulted by him about legal matters relating to the stations. Tr. 449-50.

20. Gelfand lives in Palm Beach, Florida but she has access to an apartment in Nashville which she will make her primary residence if her application is granted. Gelfand Exh. 3; Tr. 433, 456. The Nashville apartment is owned by her publishing company, Mid-Summer Music, Inc. Tr. 444. Beginning in May 1989, Gelfand has spent a few days every four to six weeks in the Nashville apartment. Tr. 433. She votes and pays taxes in Palm Beach. *Id.* Gelfand also has a Washington, D.C. apartment. Tr. 435. Gelfand's spouse operates a medical practice in Bethesda, Maryland. Tr. 434. Ms. Gelfand did not know whether her "home residence" would be in Nashville, Palm Beach, or Washington. Tr. 434-35. During the proceeding, Ms. Gelfand asserted an attorney-client privilege over twelve letters sent to her by her counsel between October 9, 1989 and May 24, 1991. Prime Exh. 5. No more than one of those letters, if that, Ms. Gelfand said, was sent to her in Nashville. Tr. 444. A letter from her technical consultant was sent to her in Bethesda, Maryland, on November 21, 1989, and a letter from a Nashville law firm about the purchase of Mid-Summer Music, Inc.'s apartment was sent in care of Michael C. Gelfand to a Rockville, Maryland address. Prime Exhs. 6 and 7. Ms. Gelfand is female. Gelfand Exh. 3, at 2.

Jamal

21. Jamal is a limited partnership in which Michael Grant is the general partner and United Communications, Inc. is the limited partner. Jamal Exh. 1, at 1. Grant holds 25 percent of the partnership's equity and UCI holds the remaining 75 percent. *Id.* UCI is owned by 13 individuals; the single largest shareholder, Lawrence Doss, is the President, Treasurer, a director and owner of 16.67 percent. *Id.*

22. Grant proposes to work full time, 40 hours per week, as the station's general manager. Jamal Exh. 3. Grant will be responsible for all management, administrative, budgetary and programming decisions relating to operation of the station. *Id.* He will resign from his current employment. *Id.* Currently, Grant is Chairperson, CEO and 50 percent owner of Conceptions, Inc., a communications consulting firm in Nashville, which he founded in February 1990. Tr. 181. Grant intends to retain his ownership and chairperson's position and make Tracy Carr, a part-time employee and college student, the CEO. Tr. 203-04. Grant represented that Jackie Thompson, his current partner in the firm, will also assume day to day responsibilities. Tr. 204. Grant will spend about five hours per month on Conceptions business. Jamal Exh. 3. During that time, he intends to read reports and attend board meetings. *Id.* The firm is Grant's main support. Tr. 202. He will also reduce his civic activities to no more than 20 hours per week. Jamal Exh. 3, at 1.

23. On one occasion, Grant consulted Doss, President of Jamal's limited partner UCI, about settlement proposals. Tr. 161-62. He has had additional written and oral communications with him about financial matters. Tr. 156-58. Grant has an understanding with Doss that he will inform him about the status of the partnership every three or four months. Tr. 169-70. Section 7.03 of Jamal's limited partnership agreement prohibits limited partners from communicating regularly with the general manager on matters pertaining to the day to day operation of the partnership's business. Jamal Exh. 7.

24. Grant did not know all 13 of the owners of the limited partnership previously but he did know the former president of UCI, Dutch Morial. Tr. 146, 155, 241-44, 261, 298-99. After Grant met all the directors of UCI, on December 9, 1989, they decided to become partners. Tr. 302-03, 310. In the year and a half after the limited partnership was formed, Doss estimates that Grant communicated with him seven or eight times about mainly financial matters. Tr. 325-26 The partnership agreement provides that the general partner will be required to contribute a maximum of $2,000. Tr. 207. The limited partner is obligated to contribute up to $80,000. Tr. 206.

25. Jamal's counsel has represented other applicants in which UCI is a limited partner. Tr. 332-33. Counsel told UCI about opportunities to participate in broadcast proceedings involving facilities allocated to Jacksonville, Florida and Vancouver, Washington. Tr. 333, 336.

26. Grant has lived in Nashville for 26 years. Jamal Exh. 3, at 1. He was born in Nashville in June 1951 and lived there until September 1969, when he left to attend college. *Id.* He also lived in Nashville after completing college, from May 1973 to April 1978, and from January 1988 to the present. *Id.* He has promised to move to Mt. Juliet. *Id.*

27. From January 1991 to the present Grant has been a Board member of the Edgehill Community Center in south Nashville; he has spent 2-3 hours per month as a board member. Jamal Exh. 3; Tr. 192. From August 1990 to May 1991, he spent 12 hours per month on the Leadership Nashville Class of 1991. Jamal Exh. 3; Tr. 192-93. From 1988 to the present and 1974 to 1978, Grant has belonged to the Nashville NAACP. He was chairperson of the NAACP's Political Action Committee from 1976 to 1977. He has been Vice President and is now President of the NAACP. From September 1989 to May 1991 he spent 3-10 hours per week on Meharry/General Merger and from July 1989 to December 1990 as Chairman of the Ad Hoc Committee on Tennessee State University; he spent 7-8 hours per week. Jamal Exh. 3. He also devotes 15 hours per week to his job as President of the NAACP. *Id.* From April 1988 to December 1990, Grant spent 6 hours per month on the Black Health Care Task Force, an appointed position. *Id.*

28. Grant also spent 20 hours per week from May to November 1988 working for a presidential candidate. Jamal Exh. 3; Tr. 194. In January and February 1975, Grant spent 10 hours per week organizing "Black Expo." In summer of 1974, he was Coordinator for Youth Vote in a state senatorial campaign 10 hours per week. *Id.* From September 1973 to May 1974, Grant spent 12 hours per week as a volunteer wrestling coach at Father Ryan Junior High School. Jamal Exh. 3. Grant is an African American. *Id.*

29. Grant, in December 1989, after he filed his application, became the host of a weekly one-hour radio show on which he spends 3 hours per week. *Id.*

Prime

30. Prime does not propose integration and did not introduce any evidence on this issue.

Auxiliary power

31. All of the applicants propose auxiliary power. Lynn Exh. 1; Gelfand Exh. 4; Jamal Exh. 4; and Prime Exh. 4.

CONCLUSIONS

Issue 1: Jamal is financially qualified and it did not falsely certify.

32. Jamal proposes to borrow the money to build and operate the Mt. Juliet facility from CVC Capital Corporation. CVC has provided Jamal with a letter of reasonable assurance for a loan of $500,000. Jamal estimates it will need approximately $421,000. Jamal Exh. 18, at 27. CVC was provided with a copy of a detailed financial plan and a financial statement of Grant's. Before Michael Grant, Jamal's general partner, obtained the promise from CVC, he had discussed with Joerg Klebe, the owner of CVC, his financial plan and personal financial statement. During those discussions, Klebe was also considering becoming the limited partner in the Jamal proposal. The record indicates that Grant and Klebe discussed the standard elements of the loan including collateral and that Grant indicated his willingness to provide the collateral. Both parties had a thorough understanding of the proposal, the risks inherent in the loan and the available collateral. Mr. Klebe is an experienced broadcast lender. Lynn asserts that there was no real understanding about what the collateral would be and, therefore, Klebe could not have legitimately provided assurance. Lynn's assertion is inaccurate. Klebe said he understood that Grant had no personal assets that

could serve as collateral but that if he did at the time the loan was made they both understood those assets would serve as collateral in addition to the station's.

33. When Grant decided shortly before the application was filed that he did not want to form a partnership with Klebe, he filed as an individual. CVC then wrote a second letter to Grant and offered assurance of financing. Lynn urges that because the second letter of assurance was sent the day before Grant filed his application, he could not have certified and still have complied in good faith with the instructions to Form 301 which require that documentation be in hand when the certification is made. There is no question that Grant acted in good faith when he certified. CVC had already sent him a letter of assurance when it looked like the applicant would be a partnership with Grant as general partner. CVC had told Grant two days before he filed that it would also make the loan if he applied as an individual. The second letter differs in no material respect from the first. Under these circumstances it cannot be concluded that Jamal did not truthfully certify.

34. Lynn also urges that Grant was not financially qualified because he did not have a source for the legal, engineering and filing fees that would arise in prosecution of his application. The current Form 301 does not appear to include prosecution expenses in the list of items to be certified. The instructions refer only to engineering and legal fees that will arise in construction and operation. Grant did include part of the amount for prosecution fees in his budget provided he could not raise the money through capital calls. Grant mistakenly believed that he could use some of the CVC loan for prosecution fees. Instead of relying on CVC money, before certification, Grant reached an agreement about prosecution fees in which he is being advanced their cost by his counsel and engineer and he will make monthly payments from his salary. He has made the payments. In January 1990, Grant amended his application and became the partnership he originally intended and the limited partner is committed to provide $80,000. That amount is more than adequate to meet the $27,050 Grant estimates the prosecution of Jamal's application will cost. The record shows that Grant had made provision for prosecuting his application when he certified and that he has more than enough money to do so today. It is irrelevant to argue, as Lynn does, that Grant did not have sufficient assets to meet future fees when he began the proceeding. Grant, his counsel, and his engineer never intended that he would use assets to pay the costs of prosecution. Jamal has demonstrated that it is financially qualified.

Issue 2: The proposal that would, on a comparative basis, best serve the public interest.

Diversification of ownership of the mass media

35. Lynn and Jamal have no attributable mass media interests. Prime's owners own, through corporations and partnerships, four radio broadcast stations. Gelfand's spouse owns a radio broadcast station and a permit for a new television station. Gelfand argues that she has met the criteria for rebutting the spousal attribution presumption. She urges that she meets the test stated by the Review Board in *Richard P. Bott, II*, 4 FCC Rcd 4924, 4927 (Rev. Bd. 1989). There the Board stated that the spouse attempting to avoid attribution must demonstrate "no prior interest or involvement" in the media properties. Ms. Gelfand has provided legal advice to her spouse about his media interests, which exhibits an interest in the media properties. The spouse must also show a history of individual and separate business interests. While Ms. Gelfand has practiced law, separate and apart from her spouse, they have invested in real estate together and in a music publishing company, which is located in Nashville. The spouse must also demonstrate that she is the sole financial force behind the application. Ms. Gelfand maintains that she has written out all checks for her application but she concedes that the money has come from an account she shares with her spouse. Ms. Gelfand claims that she will return the money she has drawn on the joint account with her own separate funds, but she has not done so. It was encumbent on Ms. Gelfand to show that her spouse has not participated in station affairs in any way. Mr. Gelfand has discussed with Ms. Gelfand her proposal and Ms. Gelfand looks to him for advice because he has superior knowledge about the broadcast business. Ms. Gelfand has also relied on legal and engineering assistance from the same people her spouse relies on. Ms. Gelfand described her discussions with her spouse as being those that two friends or a married couple might have about their interests. It is apparent that Ms. Gelfand has followed her spouse's lead when she hired the same lawyer and engineer. She failed to define the number and breadth of her discussions about the station with her spouse, although she did indicate they would continue. Ms. Gelfand was required to show that her spouse has no actual interest in her proposal. Gelfand did not make that showing by explaining in detail what their discussions were about. On the basis of the record facts, it cannot be said that Gelfand has rebutted the presumption of spousal attribution.

36. Lynn and Jamal are to be preferred over Prime and Gelfand because they have no media interests. Gelfand is to be preferred over Prime because her interests are fewer. Prime is not qualified to be compared because it has no antenna site and is, therefore, unqualified.

Integration of ownership

37. Lynn, Jamal and Gelfand each intend to integrate their principals into the management of the station on a full-time, 40 hour per week, basis.

38. The opposing applicants urge that Carolyn Lynn's promise cannot be fully credited because she has no plan to dispose of her current business, Batteries Unlimited. Lynn points out in its reply that Ms. Lynn will either sell her business or transfer her accounts to a colleague. In addition, Lynn explains that Ms. Lynn only spends 15 hours a week on the business now and that leaves more than enough time to meet her 40 hours per week commitment to the station. The record does not support the claim that Ms. Lynn's promise is unreliable. She has worked in business activities before with her spouse and they have been sold. She has alternative plans to allow her to work at the station. The opposing applicants have not shown that her plans are unrealistic.

39. Jamal argues that Ms. Lynn's role will not be managerial. Lynn responds by pointing to Mr. Lynn's testimony that Ms. Lynn will supervise sales and office functions. Ms. Lynn's testimony was consistent with that of her spouse. In another business that the Lynns owned and operated, Ms. Lynn described her duties as being those of a business manager. There is no evidence in this proceeding that Ms. Lynn has made any of the decisions involved in prosecuting Lynn's application. Mr. Lynn has made the

key decisions about who to hire for pursuing Lynn's proposal for this facility, he used his balance sheet to certify the applicant's financial qualifications, and he arranged for the antenna site. Lynn asserts that these decisions follow from Mr. Lynn's role as proposed station manager. Ms. Lynn will report to her spouse. While Ms. Lynn is to be the business manager, her claim that she will be in charge of the station's financial affairs is dubious on this record where she never took any initiative in preparing the application, arranging for the necessary services to pursue Lynn's proposal before the Commission or planning the financial future of the station. Lynn cites various times that Ms. Lynn accompanied her spouse to look at the antenna site, visit their attorney who wrote the partnership agreement, or discuss between them various aspects of the proposal. But there is no evidence that Ms. Lynn took the initiative in any part of the proposal. Lynn points out that Ms. Lynn will oversee EEO but when parts of the application were prepared about Lynn's EEO proposal, Mr. Lynn supplied the answers. The record, however, does not demonstrate that she will not oversee sales at the station or that she will not manage the office. If Ms. Lynn had never operated a business before, her lack of meaningful activity in pursuing the proposal might warrant denying her integration credit. But she has operated a business and participated in one with her spouse in essentially the same capacity that she proposes here. Lynn is entitled to 100 percent integration.

40. Gelfand is also entitled to 100 percent integration.

41. Jamal proposes that Michael Grant will spend full time, 40 hours per week at the station as the general manager. Lynn argues that Grant is not independent of UCI, Jamal's limited partner, and Prime argues that the relationship between Grant and the limited partner is not genuine because they did not know one another before they became partners. Prime and Lynn also urge that Grant has not acted independently of the limited partner. The record does not support those claims. Grant filed without a limited partner in October 1989 and it was not until December 1989 that UCI joined with Grant. It is also not accurate to assert that Grant and the owners of UCI were unknown to each other. Grant knew the former president of UCI, Dutch Morial. Mr. Morial died on December 24, 1989. Tr. 146, 155, 241-44, 298-99. Grant met each of the directors of UCI before the investment was made by UCI. Tr. 147, 302-03. It is evident that they gave extensive consideration to their partnership and that the partnership was negotiated at arms length. The partnership agreement went through seven drafts. Tr. 153, 236. Although Grant did not have broadcast experience when he filed, he started a radio talk show in December 1989 and before he filed his application he was also head of the NAACP's Communications Committee. Furthermore, Grant selected Jamal's counsel, and its engineer; he arranged for the antenna site; and he obtained financing for the project.

42. While Grant and the president of UCI have talked to one another, the record shows that it was about UCI's contributions to Jamal and the status of the Commission's consideration of Jamal's application. On one occasion Grant spoke with UCI about a settlement offer.

43. Gelfand does not believe that Grant will turn over the operation of his communications consulting firm to co-owner, Jackie Thompson, and Tracy Carr, who has worked at the firm. The plan is not inherently unbelievable and Gelfand has not shown facts which will make the plan impossible. Lynn argues that Grant has not put forward an adequate plan for reducing his extensive community service time. Jamal points out that there is no evidence that his community involvement is required and that Grant does not have discretion to participate at the level he stated he will. Without more, Lynn's argument is speculative. Grant is entitled to credit for full-time integration of ownership into management.

44. The quantitative integration proposals of Lynn, Gelfand, and Jamal are equal. Qualitatively Jamal is to be preferred over Lynn and Gelfand. Jamal's general partner, Grant, has lived in the primary service area for twenty-six years. His list of civic activities is extensive and current. He has spent substantial time working on community matters. He will move to Mt. Juliet. The Lynns have lived in Mt. Juliet for 14 years and in the proposed service area for six additional years. Their list of civic activities is also extensive, although they have not provided an estimate of the actual amount of time they spent on each activity like Grant has. Despite not having complete information about Lynn's civic activities, it appears that there is no quantifiable difference between Jamal and Lynn on their association with the service area. Jamal, however, is to be preferred over Lynn because Jamal's general partner, Grant, is an African-American. In addition, before the cut-off date for filing amendments as of right, Grant began a radio talk show. For that effort, Grant is also entitled to additional merit.

45. Gelfand has promised to move to Nashville. Six months before Gelfand filed her application, her music publishing company bought an apartment for her to stay in when she visits Nashville on business. Every six weeks she spends a few days in Nashville. Her relationship to the service area is too transitory to be characterized as being one of a local resident. Gelfand has no other qualitative attributes.

46. Jamal and Lynn are to be preferred over Gelfand on diversification of ownership. Jamal is to be preferred over all applicants on integration of ownership. All of the applicants propose auxiliary power. The public interest would best be served by granting Jamal's application.

ACCORDINGLY, IT IS ORDERED that the applications of Grady Lynn and Carol Lynn d/b/a Lynn Broadcasting (File No. BPH-891011MJ), Edith M. Gelfand (File No. BPH-891012MN), Q Prime, Inc. (File No. BPH-891012MT) ARE DENIED and the application of Jamal Broadcasting L.P. (File No. BPH-891012MS) for a construction permit for a new FM station on Channel 294A in Mt. Juliet, Tennessee IS GRANTED[1] provided:

> Before PROGRAM TEST AUTHORITY is authorized by the Commission a fence must be erected at such distances and in such a manner as to prevent the exposure of humans to radio-frequency radiation in excess of the American National Standards Institute Guidelines (OST Bulletin No. 65, October 1985). The fence must be of a type which will preclude casual or inadvertent access, and must include warning signs at appropriate intervals which describe the nature of the hazard. Permittee shall submit documentation of compliance with this special operating condition along with the form 302, application for license, and the request for PROGRAM TEST AUTHORITY.

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Sec. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 30, 1992

CENTURY TELEPHONE ENTERPRISES, INC., FILES PETITION FOR WAIVER OF ACCESS TARIFF FILING REQUIREMENTS

Pleading Cycle Established

Comments Due: April 6, 1992
Reply Comments Due: April 13, 1992

On March 20, 1992, Century Telephone Enterprises, Inc. (Century) filed a petition for waiver of the annual access tariff filing requirements of Section 69.3(a) of the Commission's Rules, 47 C.F.R. § 69.3(a). Century requests waiver of the annual access tariff filing requirements with respect to the April 2, 1992, access tariff filing for Central Telephone Company of Ohio (Centel-Ohio).

Century is in the process of acquiring Centel-Ohio from Centel Corporation. Century states that, given the timing of its Centel-Ohio acquisition, it lacks the time and data to determine accurately the rate impacts of this acquisition, and to prepare the requisite tariff filings, prior to the July 1, 1992, effective date of this year's annual access tariffs.

According to Century, in lieu of an April 2, 1992, access filing, Centel-Ohio will file shortly before the closing date of the Century stock acquisition, a tariff revision reflecting Century Telephone of Ohio (the new operating company) as a concurring carrier in order to preserve billing and ordering continuity. Shortly after the closing date, Century Telephone of Ohio desires to file a "copycat" tariff, which will be identical to the revised Centel-Ohio tariff except for the name of the issuing carrier.

Interested parties may file comments regarding the Century petition for waiver no later than **April 6, 1992.** Reply comments may be filed no later than **April 13, 1992.**

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with Downtown Copy Center, the Commission's duplicating contractor, at its office in Room 246, 1919 M Street, N.W., Washington, D.C. 20554, and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

Copies of the waiver petition and other related documents may be obtained from Downtown Copy Center. The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Wanda M. Harris, Tariff Division, Common Carrier Bureau at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Century Telephone Enterprises, Inc.

Petition for Waiver of
Section 69.3(a) of the
Commission's Rules

ORDER

Adopted: April 1, 1992; Released: April 1, 1992

By the Chief, Common Carrier Bureau:

1. On March 20, 1992, Century Telephone Enterprises, Inc. (Century) filed a petition for waiver of the annual access tariff filing requirements of Section 69.3(a) of the Commission's Rules, 47 C.F.R. § 69.3(a). Century is acquiring Central Telephone of Ohio (Centel-Ohio) from Centel Corporation. Century states that due to the timing of this acquisition Century does not have adequate time or data to determine the rate impacts of this acquisition and to prepare the requisite tariff filings prior to the July 1, 1992 effective date of the annual access tariff filing.

2. On March 30, 1992, the Common Carrier Bureau issued a public notice requesting comments on Century's petition for waiver.[1] We directed interested parties to file comments regarding Century's petition not later than April 6, 1992 and reply comments not later than April 13, 1992. In order to have sufficient time to consider Century's petition and any comments, we defer the filing date for Century's and Centel-Ohio's 1992 annual access tariff filing until May 1, 1992. We emphasize that we express no opinion regarding the merits of Century's petition.

3. Accordingly, IT IS ORDERED, that the petition for waiver of Section 69.3(a) of the Commission's Rules filed by Century Telephone Enterprises, Inc., IS GRANTED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[1] Century Telephone Enterprises, Inc., Files Petition for Waiver of Access Tariff Filing Requirements, DA 92-390, released Mar. 30, 1992 (Com.Car.Bur.).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-64

In the Matter of

Policies and Rules Concerning
Changing Long Distance Carriers

ORDER

Adopted: April 2, 1992; Released: April 3, 1992

By the Chief, Common Carrier Bureau:

1. On January 9, 1992, the Commission released the *PIC Selection Order*[1] directing interexchange carriers to implement one of four procedures designed to verify customer orders for service. US Sprint Communications Company (Sprint) and Touch 1 Long Distance Company (Touch 1) have filed petitions for waiver[2] to permit them to use in-house verification instead of one of the procedures set forth in the *PIC Selection Order*. MCI Telecommunications Corporation (MCI) filed an opposition to Sprint's petition, to which Sprint replied.[3] Petitioners also filed motions for stay of the Order pending Commission action on their waiver petitions.[4] For the reasons set forth below we deny the petitions for waiver and the motions for stay.

I. PETITIONS FOR WAIVER

A. Positions of the Parties

2. Sprint requests that the Commission waive the Report and Order to allow Sprint to perform in-house verification of outbound telemarketing sales. Sprint maintains that in rejecting in-house verification as an alternative the Commission did not consider cost data which, according to Sprint, justifies granting of its request. *Id.* at 4-5. Sprint claims that its procedure is effective and that the majority of complaints that the Commission received in the past regarding unauthorized switching by Sprint were attributable to resellers who use Sprint as their underlying carrier. Sprint Petition at 1-3. It notes that the Commission suggested that the fourth option, the National Association of Regulatory Utility Commissioners (NARUC) proposal,[5] would be even less expensive than using in-house verification. Sprint contends, however, that if it used the NARUC option, it would lose revenues during the waiting period that would be more than the costs of third-party verification. *Id.* at 5-6. Finally, it proposes that if the Commission does not grant Sprint a waiver to perform in-house verification, Sprint should be allowed to contract with its corporate affiliate's non-commissioned staff to perform off-premises verification of Sprint's telemarketing calls. *Id.* at 6.

3. Touch 1 also argues that the Commission should waive the Report and Order to allow it to use in-house verification. It contends that being required to change its verification procedure of four months' duration to one of the options adopted by the Commission will be harmful to Touch 1 and its customers. Touch 1 Petition at 2. Touch 1 argues that its procedure, whereby in-house staff tape-records verification calls to customers and compares the tapes to the paper sales records, is inexpensive and effective. *Id.* at 3-5. According to Touch 1, independent third-party verification does not provide tangible evidence of verification to resolve customer-disputed orders. *Id.* at 5-6. Moreover, Touch 1 contends that third-party verification would triple its verification costs. *Id.* at 7.

4. MCI opposes Sprint's position, arguing that the Commission has already considered and rejected Sprint's position and has indicated that there are alternatives available to Sprint that are cheaper than third-party verification. MCI Opposition at 2. MCI also contends that Sprint's claim that it would lose revenue if Sprint adopted the NARUC option is not persuasive because the Commission is not obligated to select a verification method that might be least costly to Sprint. MCI says that if Sprint believes that third-party verification and the NARUC options would be too costly, Sprint has two other options available. *Id.* at 2-3. MCI also argues that because the Commission concluded that third-party verification better protects consumers by creating evidence totally independent of carriers' marketing operations, Sprint's request to use in-house verification is inconsistent with the public interest. *Id.* at 3.

5. Sprint replies that MCI does not address Sprint's argument that it is uniquely disadvantaged by the Commission's Rules. Sprint Reply at 1. According to Sprint, because MCI and AT&T agreed to use third-party verification in settlement of litigation between themselves, the Commission's Rules require no change in AT&T and MCI's

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[1] Policies and Rules Concerning Changing Long Distance Carriers, CC Docket No. 91-64, Report and Order, 6 FCC Rcd 1038 (1992) (*PIC Selection Order*), *recon. pending*.

[2] Petition for Waiver, filed Feb. 18, 1992, by Sprint (*Sprint Petition*); Petition for Waiver, filed Feb. 28, 1992, by Touch 1 (*Touch 1 Petition*).

[3] Opposition to Petition for Waiver, filed Feb. 28, 1992, by MCI (*MCI Opposition*); Reply to MCI Opposition, filed Mar. 10, 1992, by Sprint (*Sprint Reply*).

[4] Sprint Motion for Limited Stay of Order Pending Waiver, filed Feb. 18, 1992 (Sprint Motion); Touch 1 Motion for Limited Stay of Order, filed Feb. 28, 1992 (Touch Motion). AT&T filed an opposition to Sprint's motion. AT&T Opposition to Motion for Limited Stay, filed Feb. 25, 1992 (AT&T Opposition).

[5] The NARUC option provides that, for sales generated by telemarketing, within three business days of the customer's request for a change in long distance carrier, the carrier must send each new customer an information package by first class mail containing all the pertinent information about the requested change. The packet also includes a postpaid postcard which the customer can use to deny, cancel, or confirm a service order. If the customer does not return the postcard, the customer's long distance service will be switched, within 14 days after the date the information package was mailed, to the soliciting carrier. Interexchange carriers (IXCs) must wait 14 days after the form is mailed to customers before submitting their primary interexchange carrier (PIC) change orders to local exchange carriers (LECs). If customers have cancelled their orders during the waiting period, IXCs, of course, cannot submit the customers' orders to the LECs.

operations, but would require extensive changes in Sprint's. *Id.* at 1-2. Sprint maintains that MCI does not attempt to challenge the efficacy of Sprint's verification efforts nor does MCI compare the record of MCI's third-party verification efforts with that of Sprint. *Id.* at 2. Sprint also claims that MCI overlooked Sprint's offer to have its waiver conditioned on a quarterly external audit of its verification procedures.

B. Discussion

6. The Commission tentatively concluded in the *PIC Change NPRM*[6] that modification of carrier selection procedures was necessary to protect the interests of consumers. The Commission carefully considered comments in that proceeding, including those filed by Sprint as well as by other carriers, that in-house verification of telemarketing sales provided sufficient protection to consumers. The Commission weighed these comments against arguments made by other parties, that the purpose of revised verification was to create independent, unambiguous evidence of customer choice and to eliminate or reduce the abuses caused by overzealous carrier telemarketing activities. *See PIC Selection Order,* 6 FCC Rcd at 1041.

7. Sprint argues that it should be granted a waiver to use in-house verification because its procedure is sound and effective. However, because the Commission strongly supports independent third-party verification as an important consumer protection, the Commission concluded that in-house verification is not an acceptable procedure for verifying sales of long distance service generated by telemarketing. Sprint has provided no new evidence to persuade us that Sprint's in-house verification offers sufficient protection to consumers to allow a waiver of the rule. Sprint alternatively suggests in its petition that its corporate affiliate conduct verification in premises physically separate from Sprint. We conclude that use of a corporate affiliate does not meet the requirement of an independent third party conducting verification of sales.

8. Sprint argues that it should be allowed a waiver of the general rule to use in-house verification because it would be uniquely disadvantaged, compared to AT&T and MCI, by instituting third-party verification. Sprint continues to argue that use of third-party verifiers is more expensive than in-house verification. However, Sprint is not required to choose third-party verification, as the Commission provided three other verification options from which to choose -- obtaining customers' written authorization before submitting orders; providing an 800 number for customer-initiated electronic verification of orders; and the NARUC procedure, as described above.

9. In opting for third-party verification as one of the four options available for carrier use, the Commission noted that carriers concerned about the costs of such verification could select the NARUC option. The NARUC option, in particular, requires only a slight modification to the information packets which carriers are currently required to send new customers,[7] and allows carriers to provide service and earn revenue during the waiting period via their 10XXX codes. Sprint's dismissal of that option as an alternative because of speculative lost revenues is not convincing. We note that customers who have selected Sprint as a result of a telemarketing sale may immediately begin to use Sprint's services, if they wish, by simply using Sprint's 10XXX code, which can be supplied to them when they agree to order Sprint's service. The same is true for Touch 1, which appears to have adopted its in-house verification program only recently and in the face of concerns voiced about such programs by the Commission, by members of Congress, and by commenting parties.

II. MOTIONS FOR STAY

A. Positions of the Parties

10. The petitioners also seek a stay of the requirement that interexchange carriers use independent third party personnel for telephone verification of outbound telemarketing calls until 90 days after the Commission acts on their respective petitions for waiver. The petitioners argue that in the event their petitions are denied, a stay is necessary to allow them time to arrange for independent third party verification procedures. Sprint Motion at 1; Touch 1 Motion at 1. Although the petitioners admit that they cannot assess the likelihood of success on the merits, they suggest that the Commission should focus its attention on balancing the remaining standards for a stay,[8] which the petitioners maintain they have met. *Id.* at 2-3. The petitioners maintain that they will suffer irreparable injury absent a stay because they will incur startup costs for independent third-party verification which they cannot recover should the Commission then grant them waiver of this requirement. In addition, Sprint claims that it will be forced to terminate a number of employees who currently perform in-house verification. Sprint Motion at 3; Touch 1 Motion at 3-4.

11. The petitioners also contend that a stay might only harm those persons who are inconvenienced by unauthorized switching of their long distance carriers that was not properly verified by the petitioners' in-house personnel. Sprint Motion at 3-4; Touch 1 Motion at 4. Finally, the petitioners claim that a stay will not result in harm to the public interest because their in-house verifications procedures are more effective than third-party verification. Moreover, the petitioners state that they will return to their previous carriers any dissatisfied customers who have been accidentally switched and who notify them of the problem within a reasonable period of time. In addition, note the petitioners, customers are able to file complaints against them under Sections 206-208 of the Communications Act, 47 U.S.C. §§ 206-208. *Id.* at 4; *id.* at 4.

12. AT&T argues that Sprint has not met the standards for granting a stay. AT&T Opposition at 1-2. AT&T contends that because the Commission already considered and rejected in-house verification, absent some new evidence or legal argument, mere repetition of Sprint's previous

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[6] American Telephone and Telegraph Company, Petition for Rulemaking, CC Docket No. 91-64, Notice of Proposed Rulemaking, 6 FCC Rcd 1689 (1991) (*PIC Change NPRM*).

[7] Carriers are required to institute steps to obtain letters of authorization from customers which, in the event of a disputed order, they are asked to provide to the LEC. Carriers that cannot produce such proof of authorization may be liable for change charges.

[8] *See Virginia Petroleum Jobbers Ass'n v. FPC,* 259 F.2d 921, 925 (D.C. Cir. 1958).

position cannot be deemed likely to succeed on the merits. *Id.* at 2. Moreover, contends AT&T, Sprint cannot satisfy the third and fourth criteria of *Virginia Jobbers*, namely, that a stay will cause no harm to other parties and will serve the public interest. *Id.* at 2-3.

B. Discussion

13. Petitioners' request for a 90-stay in order to implement their choice of the verification options adopted in the *PIC Selection Order* will not be granted, particularly because the Order provided that carriers implement their choices only sixty days after publication. We recognize, however, that the petitioners may require a brief period of time to institute revised verification procedures. We therefore grant Sprint and Touch 1 a stay of the verification requirements until May 1, 1992. As of that date, Sprint and Touch 1 must have in place one of the four verification procedures set forth in the Order.

III. CONCLUSION AND ORDERING CLAUSES

14. The Common Carrier Bureau has reviewed the petitions, motions, and all associated pleadings. We conclude that, for the reasons discussed above, the petitions filed by Sprint and Touch 1 should be denied. We also conclude that the motions for stay filed by Sprint and Touch 1 should be granted to the extent indicated above.

15. Accordingly, IT IS ORDERED that the petition for waiver filed by Sprint Communications Company LP IS DENIED.

16. IT IS FURTHER ORDERED that the petition for waiver filed by Touch 1 Long Distance Company IS DENIED.

17. IT IS FURTHER ORDERED that the motion for stay filed by Sprint Communications Company LP IS GRANTED to the extent indicated above.

18. IT IS FURTHER ORDERED that the motion for stay filed by Touch 1 Long Distance Company IS GRANTED to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications	Contract Tariff
Contract Tariff	Transmittal No. 10
F.C.C. No. 5	

ORDER

Adopted: April 9, 1992; Released: April 9, 1992

By the Chief, Common Carrier Bureau:

1. On March 27, 1992, AT&T Communications (AT&T) filed Contract Tariff Transmittal No. 10 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 5 for AT&T Accunet Spectrum of Digital Services, Accunet T1.5 Service, Voice Grade Local Channel Service, and Terrestrial 1.544 Mbps Local Channel Service.

2. On April 3, 1992, MCI Telecommunications Corporation filed a petition to reject or in the alternative to suspend and investigate Contract Tariff Transmittal No. 10 and Sprint Communications Company filed a petition to reject or alternatively suspend and investigate Contract Tariff Transmittal No. 10.

3. The Common Carrier Bureau has reviewed AT&T Communications Contract Tariff Transmittal No. 10 and the petitions. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petitions do not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to reject or, in the alternative, to suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 5, Transmittal No. 10, filed by MCI Telecommunications Corporation, and the petition to reject or alternatively suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 5, Transmittal No. 10, filed by Sprint Communications Company, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon. pending*.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-91

In the Matter of

Open Network Architecture Tariffs
of Bell Operating Companies

ORDER DESIGNATING ISSUES FOR INVESTIGATION

Adopted: April 14, 1992; Released: April 16, 1992

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On December 27, 1991, and January 31, 1992, the Common Carrier Bureau (Bureau) instituted investigations into the lawfulness of the Open Network Architecture (ONA) rates filed by the Bell Operating Companies (BOCs).[1] We suspended these rates for one day, and imposed accounting orders. On February 21, 1992, the BOCs filed tariffs for other ONA services. The Bureau also initiated an investigation into those rates.[2] By this Order, we combine these investigations and designate specific issues to be examined. The issues designated are primarily designed to permit examination of the wide disparity in rate levels of BSEs among the BOCs to determine if the various rate levels are reasonable. We also designate some other issues.[3]

2. To develop rates for basic service elements (BSEs), the BOCs have employed the Switching Cost Information System (SCIS) and other computer models to quantify the engineering processes of a central office switch in order to apportion its capacity and cost among the functions the switch provides. In the *SCIS Disclosure Order*, the Bureau established procedures by which parties in the ONA tariff investigation may examine a redacted version of SCIS, and also found that certain proprietary aspects of these computer models cannot practicably be disclosed on the public record.[4] Those aspects were referred to an independent auditor together with unredacted SCIS models and related data.[5] The *SCIS Disclosure Order* thus established separate *in camera* mechanisms to examine the validity of the model. We will determine whether further proceedings should be conducted to examine the validity of the models at a later date. This Order designates issues that do not depend upon the validity of the models. These issues can be addressed in the public record without reliance upon confidential information.[6]

II. REASONABLENESS OF BSE OR BSA RATES

3. The SCIS/SCM models permit carriers to specify some variables that affect results. Carriers also make adjustments to model outputs in deriving rates that are not dictated by the model. We are directing the carriers to justify some of these variables or adjustments in order to determine whether they constitute unreasonable methods of rate development, and whether the resulting rates are just and reasonable. The carriers are directed to respond to the following questions:

(1) Is the development of unit investment for BSEs on the basis of the (short run) marginal investment option of SCIS and SCM a reasonable method that is consistent with the Commission's ONA requirements and policies?

BellSouth and Southwestern Bell are directed to respond to this question. Those carriers shall also provide in their direct cases comprehensive alternative BSE rates that reflect use of the average basis assumption within the SCIS model.

(2) Have carriers selected model offices that are representative of offices that will be used to provide BSEs?

For each switching office and remote included in the carriers' investment cost studies, the carriers should provide on the record the corresponding assumptions regarding switch replacement schedule, and switch capacity at replacement, that are used as inputs to develop the SCIS "model office."

It is unclear whether carriers have included all switching offices and remotes in the data used by SCIS to establish the model offices from which SCIS develops cost data

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[1] Ameritech Operating Companies, Revisions to Tariff F.C.C. No. 2, Open Network Architecture, Memorandum Opinion and Order, 7 FCC Rcd 257 (Com.Car.Bur. 1991) (*Ameritech ONA Tariff Order*), *modified by* Ameritech Operating Companies, 7 FCC Rcd 948 (Com.Car.Bur. 1992); Bell Atlantic Telephone Companies, *et al.*, Open Network Architecture Tariffs, 7 FCC Rcd 1512 (Com.Car.Bur. 1992) (*ONA Investigation Order*). The Bell Operating Companies are the Ameritech Operating Companies, (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Telephone Companies (BellSouth), New York Telephone Company and New England Telephone and Telegraph Company (NYNEX), Pacific Bell, Nevada Bell, Southwestern Bell Telephone Company (Southwestern Bell), and US West Communications, Inc. (US West).

[2] Ameritech Operating Companies, *et al.*, Open Network Architecture Tariffs, DA 92-273, released Mar. 6, 1992 (Com.Car.Bur.) (*BSE Withdrawal Tariff Order*).

[3] On January 31, 1992, certain BOCs were ordered to tariff some BSEs that those BOCs listed in their ONA plans, but later sought permission to withdraw. Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Filing and Review of Open Network Architecture Plans, CC Docket Nos. 89-79, 88-2, 7 FCC Rcd 811 (Com.Car.Bur. 1992). Pacific Bell complied with this Order in Transmittal No. 1571. Transmittal No. 1571 was suspended for one day and took effect subject to an accounting Order. *Id.* We are not designating issues that relate to Pacific Bell Transmittal No. 1571 at this time. We may issue a Supplemental Designation Order relating to that transmittal.

[4] Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 1526 (Com.Car.Bur. 1992) (*SCIS Disclosure Order*).

[5] *Id.*

[6] It may also be necessary to designate further issues, other than the SCIS/SCM model's validity, after we have received and examined the independent auditor's report.

for vertical service functions. Therefore, carriers are directed to state in their direct cases whether all switching offices and remotes are included in their model offices and, if not, to describe the methods used to select the facilities represented in the model office. If statistical sampling techniques have been used to develop a model office, the carrier should describe in detail the techniques used.

(3) Is use of a cost of money that exceeds 11.25 percent reasonable?

Carriers that used a cost of money in excess of the authorized 11.25 percent rate of return, either as a SCIS variable or at any other point in the ratemaking process, must explain why the use of such a "cost of money" will not produce excessive BSE rates.

(4) Should 1ESS and/or 1AESS switch costs be included in the development of BSE rates?

We direct those carriers that based their BSE rates in part on costs associated with 1ESS switches and 1AESS switches [7] to explain why including costs for this switching equipment in BSE rate development is reasonable.

Those carriers must provide a comprehensive listing of BSE rates that would be developed excluding these switch technologies. Cost support for these rates should include a quantitative description of the mix of switch technologies assumed. Furthermore, we direct those carriers to demonstrate how embedded switch technology assumptions promote each of the four Commission goals explained in the *Part 69 ONA Order*.[8] Specifically, those carriers should explain (i) how BOC flexibility to price efficiently is furthered by the assumption of embedded switch technology; (ii) how BOC incentives to innovate are fostered by reliance on the embedded technology assumption; (iii) how reliance on embedded technology costs fosters the Commission's stated goal that BOCs not set rates excessively high; and (iv) how reliance on embedded technology furthers the goal that BOCs not engage in unreasonably discriminatory pricing.[9]

(5) Are the BellSouth and US West overhead loadings excessive?

Our analysis of overhead loadings, displayed in Attachment A of this Order,[10] reveals that BellSouth and US West apply loadings to their direct costs that significantly exceed the overheads applied by the other carriers and appear excessive.[11] We direct BellSouth and US West to explain why their overhead loadings are not excessive.

(6) Have carriers adequately justified their use of nonuniform overhead loadings in pricing BSEs?

A separate issue arises from the fact that certain carriers do not apply uniform overhead loadings to each of their BSEs. Overhead loadings below the level indicated by adherence to "uniform practice, as well as loadings exceeding the uniform practice, are indicated in Attachment A. Those carriers so identified should, in their direct cases, either demonstrate that they have applied uniform overhead loadings, or justify the use of each loading that departs from uniform loading practice.

(7) Are differences between BSE rates and unit costs differences justified?

Some BSE rates do not appear to represent the aggregate of direct costs plus overheads. See Attachment B. We direct each carrier, for each ratio between rates and aggregate direct costs (including overheads) that is emphasized in the Attachment,[12] to either demonstrate that the unit costs it used are in fact equivalent to the tariffed rate, or to justify any difference between the rate and the unit costs (direct cost plus overheads).

III. OTHER ISSUES

We are also designating some questions for investigation relating to particular rates or practices of particular carriers. We direct Southwestern Bell to respond to Questions 1 and 2 and direct Ameritech to respond to Question 3.

(1) Are the rates for Southwestern Bell's packet switching BSEs excessive?

Southwestern Bell is directed to provide the following information with respect to packet switching BSE rates:

(a) The classification and amounts of investment underlying each of the nine BSEs tariffed in Transmittal No. 2146, and the methods used to determine investment.

(b) Southwestern Bell should identify and fully document all direct costs and overheads applied to the investment identified above, and describe the ratemaking methods used. If the ratemaking methodology differs from the method used for other Southwestern Bell switched access BSEs, Southwestern Bell should explain why a different method was used.

(c) As to ONA elements priced substantially above cost, and allegedly priced to avoid arbitrage between the jurisdictions, Southwestern Bell should explain why it believes avoiding arbitrage justifies such pricing and explain the basis for its expectation that significant arbitrage would result absent such pricing adjustments.

(2) Is the Southwestern Bell access service reports (ASRs) requirement an unreasonable practice?

We direct Southwestern Bell to explain why customers planning to use only the same features and functions under ONA as they used in a feature group offering should be required to submit ASRs.

(3) Should Ameritech be allowed to tariff Call Detail Recording (CDR) as a BSE?

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[7] Ameritech, Bell Atlantic, NYNEX, and Pacific Bell include 1ESS and 1AESS switches in their investment for ratemaking purposes.

[8] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, Report and Order, Order on Reconsideration, and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991) (*Part 69 ONA Order*).

[9] *See Part 69 ONA Order*, 6 FCC Rcd at 4531, para. 38.

[10] Data from Chart Unit, Line 8, Overhead Loadings/Line 7, Total Direct Costs.

[11] For example, BellSouth applies overheads for BSEs that exceed direct costs by a range of 200 percent (Faster Signaling on DID for Each Additional 20 Numbers) to 221 percent (Multiline Hunt Group - Individual Access to Each Port). US West uses overheads that range between 123 percent (Three Way Call Transfer) to 173 percent (DID Trunk Queuing). *See* Attachment A.

[12] The ratios are emphasized by outlining in the chart.

We direct Ameritech to describe in its direct case why it believes tariffing of this service is consistent with the Commission's decision in the *Billing and Collection Detariffing Order*.

IV. PROCEDURAL MATTERS

A. Filing Schedules

4. This investigation will be conducted as a notice and comment proceeding to which the procedures set forth in this Order shall apply. We designate Ameritech, Bell Atlantic, BellSouth, NYNEX, Pacific Bell, Nevada Bell, Southwestern Bell, and US West as parties to this investigation, and require parties to file direct cases addressing the issues outlined above no later than [30 days after release date of Order]. In their direct cases, the BOCs must respond to each of the issues described in this Order. Moreover, the direct cases must supply all information upon which the BOCs rely to support their positions. Pleadings responding to the direct cases may be filed no later than [30 days after direct cases filed], and must be captioned "Opposition to Direct Case" or "Comments on Direct Case. " The parties may each file a "Rebuttal" to oppositions or comments no later than [15 days after oppositions filed].

5. An original and seven copies of all pleadings shall be filed with the Secretary of the Commission. In addition, one copy shall be delivered to the Commission's commercial copying firm, Downtown Copy Center, Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Also, one copy shall be delivered to the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Members of the general public who wish to express their views in an informal manner regarding the issues in this investigation may do so by submitting one copy of their comments to the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Such comments should specify the docket number of this investigation.

6. All relevant and timely pleadings will be considered by the Commission. In reaching a decision, the Commission may take into account information and ideas not contained in pleadings, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of reliance on such information is noted in the Order.

B. *Ex Parte* Requirements

7. *Ex parte* contacts (*i.e.*, written or oral communications which address the procedural or substantive merits of the proceeding which are directed to any member, officer, or employee of the Commission who may reasonably be expected to be involved in the decisional process in this proceeding) are permitted in this proceeding until a final Order is released and after the final Order itself is issued. Written *ex parte* contacts must be filed on the day submitted with the Secretary and Commission employees receiving each presentation. For other requirements, *see generally* Section 1.1200 *et seq.* of the Commission's Rules, 47 C.F.R. §§ 1.1200 *et seq.*

C. Paperwork Reduction Act

8. The investigation established in this Order has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection, or recordkeeping, labeling, disclosure or other record retention requirements as contemplated under the statute. *See* 44 U.S.C. § 3502(4)(A).

V. ORDERING CLAUSES

9. IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201(b), 203(c), 204(a), 205, and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201(b), 203(c), 204(a), 205, and 403, that the issues set forth in this Order ARE DESIGNATED FOR INVESTIGATION.

10. IT IS FURTHER ORDERED that Ameritech Operating Companies, Bell Atlantic Telephone Companies, BellSouth Telecommunications Company, NYNEX Telephone Companies, Pacific Bell, Nevada Bell, Southwestern Bell Telephone Company, and US West Communications, Inc., SHALL BE parties to this proceeding.

11. IT IS FURTHER ORDERED that each carrier shall include a response to each item of information requested in Section II, *supra*, in its direct case.

12. IT IS FURTHER ORDERED that this Order shall become effective on the date of its adoption.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

ATTACHMENT A

RATIOS OF OVERHEAD LOADINGS TO DIRECT COSTS
(OVERHEAD LOADINGS / DIRECT COSTS*)

	COMPANIES	AMTR	BATR	BSTR	NYTC	NETC	PTCA	PTNY	SWTR	USTR
	BASIC SERVICE ELEMENTS									
1	ALTERNATE ROUTING (A)**				0.7502	0.5644			0.2330	
2	ANSWER SUPERVISION WITH LINE SIDE INTERFACE (B)	0.6224	0.2786							1.3878
3	CALL DENIAL (E)***						0.2601			
4	CALL DETAIL RECORDING REPORTS (F)	0.6178								
5	CALLED DIRECTORY NUMBER DELIVERY VIA 900/800 (G)	0.6175								
6	CALLED DIRECTORY NUMBER DELIVERY VIA DID (H)		0.2785				0.2600			1.3798
7	CALLING BILLING NUMBER DELIVERY (ANI) (J)	0.6177	0.2785	2.1687	0.7500	0.5653	0.2615	0.1898	0.2237	1.3398
8	DID TRUNK QUEING (M)		0.2788							1.7273
9	LINE MONITOR SERVICE (Q)		0.2785							
10	MAKE BUSY KEY (R)	0.6183	0.2785				0.2593		0.2131	1.3781
11	MESSAGE DESK (SMDI) (S)	0.6181	0.2785	2.1900			0.2592			
12	MESSAGE DESK (SMDI) EXPANDED (T)	0.6178								
13	MESSAGE WAITING INDICATOR – ACTIVATION (AUDIBLE) (U)	0.6179					0.2588			
14	MESSAGE WAITING INDICATOR – EXPANDED (V)	0.6177					0.2594			
15	MULTILINE HUNT GROUP (W)	0.6181	0.2785	2.1923	0.7502	0.5644	0.2588	0.1875	0.1875	1.3361
16	MULTILINE HUNT GROUP CIRCULAR (X)	0.6134	0.2785							
17	MULTILINE HUNT GROUP CO ANNOUNCEMENT (Y)	0.6171			0.7502	0.5644	0.2591		0.2165	1.3758
18	MULTILINE HUNT GROUP INDIVIDUAL ACCESS TO EACH PORT (Z)		0.2785	2.2105						
19	MULTILINE HUNT GROUP OVERFLOW (AA)	0.6185								
20	MULTILINE HUNT GROUP PREFERRED (AB)	0.6210	0.2785							
21	MULTILINE HUNT GROUP UCD WITH QUEING (AC)	0.6179			0.7502	0.5644	0.2602		0.2182	1.3781
22	MULTILINE HUNT GROUP UNIFORM CALL DISTRIBUTION – LINE HUNTING (AD)	0.6199	0.2788	2.1685	0.7502	0.5644	0.2597	0.1894	0.2285	1.3825
23	NETWORK RECONFIGURATION (AE)						0.3517			
24	SERVICE CODE DENIAL (AI)						0.2601			
25	THREE WAY CALL TRANSFER (AL)	0.6125	0.2785				0.2588			1.3781
26	THREE WAY CALLING (AM)		0.2788		0.7502	0.5644				1.4276
27	VERIFY INTEGRITY OF SUBSCRIBER						0.2788			
28	PBX						0.2518			
29	FASTER SIGNALING ON DID EST/ABLISHMENT OF DID WITH LISBA SERVICE			2.0000						
30	FASTER SIGNALING ON DID EACH ADDL 20 NUMBERS			2.0000						
31	FASTER SIGNALING ON DID OR DID/DOD TRK TERMINATION INCL. DIAL PULSE SIGNALING			2.1900						
32	FASTER SIGNALING ON DID DTMF SIGNALING			2.1900						
33	FASTER SIGNALING ON DID DMF SIGNALING			2.1905						
34	MAKE BUSY PER KEY ARRANGEMENT			2.1901						
35	MAKE BUSY PER CUSTOMIZED CENTRAL OFFICE ANNOUNCEMENT			2.1900						
36	800 SERVICE TO DID EST OF DID WATS LINE			2.0000						
37	800 SERVICE TO DID EACH ADDL 20 NUMBERS			2.0000						
38	800 SERVICE TO DID OR DID/DOD TRK TERM INCL DIAL PULSE SIGNALING			2.1901						
39	800 SERVICE TO DID DTMF SIGNALING			2.1900						
40	800 SERVICE TO DID MF SIGNALING			2.1905						
41	BCLID			2.1900						
42	SCN			2.1901						

NOTES

* SOURCE: ONA TRP CHART RATIO LN 3 / CHART "UNIT" LN 9.
** BSE LETTERS IN PARAENTHESES REFER TO COLUMNS ON ONA TRP CHART UNIT
*** BSES C,D,I,K,L,N,O,P,AF,AG,AH,AJ,AK,AN AND AO ARE INCLUDED IN CHART "UNIT" BUT WERE NOT OFFERED BY ANY CARRIER
OUTLINED RATIOS DEVIATE SIGNIFICANTLY FROM THE NORM AND REQUIRE EXPLANATION

ATTACHMENT B

RATIOS OF RATE TO UNIT COST
(ANNUAL RATES / ANNUAL COSTS*)

	COMPANIES	AMTN	BATR	BSTR	NYTC	NETC	PTCA	SCNV	SWTR	USTR
	BASIC SERVICE ELEMENTS									
1	ALTERNATE ROUTING (A)**				0.9235	1.0175			1.0078	
2	ANSWER SUPERVISION WITH LINE SIDE INTERFACE (B)	1.0063	1.0000							1.0000
3	CALL DENIAL (E)						0.9785			
4	CALL DETAIL RECORDING REPORTS (F)	6.2315								
5	CALLED DIRECTORY NUMBER DELIVERY VIA 900NXX (O)	1.0000								
6	CALLED DIRECTORY NUMBER DELIVERY VIA DID (H)		1.0272				0.9977			1.0000
7	CALLING BILLING NUMBER DELIVERY (ANI) (J)	1.0000	1.0688	1.0000	1.0000	1.0000	1.0000	1.5812	1.0108	1.0000
8	DID TRUNK QUEING (M)		1.0000							1.0000
9	LINE MONITOR SERVICE (Q)		1.0000							
10	MAKE BUSY KEY (R)	1.0220	1.0000				0.9890		1.1883	1.0000
11	MESSAGE DESK (SMDI) (S)	1.0283	1.0000	1.0000			0.9897			
12	MESSAGE DESK (SMDI) EXPANDED (T)	1.0216								
13	MESSAGE WAITING INDICATOR – ACTIVATION (AUDIBLE) (U)	1.0106								
14	MESSAGE WAITING INDICATOR – EXPANDED (V)	1.0129								
15	MULTILINE HUNT GROUP (W)	0.9946	0.9973	0.9914	0.9880	1.0040	1.0085	1.3158	1.2832	1.0000
16	MULTILINE HUNT GROUP CIRCULAR (X)	0.9975	0.9973							
17	MULTILINE HUNT GROUP CO ANNOUNCEMENT (Y)	1.0087			0.9472	0.9886	1.0042		1.0000	1.0000
18	MULTILINE HUNT GROUP INDIVIDUAL ACCESS TO EACH PORT (Z)		1.0018	1.0000						
19	MULTILINE HUNT GROUP OVERFLOW (AA)	0.9999								
20	MULTILINE HUNT GROUP PREFERRED (AB)	1.0070								
21	MULTILINE HUNT GROUP UCD WITH QUEING (AC)	1.0070			0.9880	0.9145	1.0085		1.0000	1.0000
22	MULTILINE HUNT GROUP UNIFORM CALL DISTRIBUTION – LINE HUNTING (AD)	1.0007	0.9999	0.9914	0.9880	1.0040	0.9999	0.9125	1.0000	1.0000
23	NETWORK RECONFIGURATION (AE)						1.0418			
24	SERVICE CODE DENIAL (AI)						0.9785			
25	THREE WAY CALL TRANSFER (AK)	0.9998	1.0000				1.0000			1.0000
26	THREE WAY CALLING (AM)		1.0000		1.0000	1.0040				1.0000
27	VERIFY INTEGRITY OF SUBSCRIBER						0.9897			
28	PBX						1.0040			
29	FASTER SIGNALING ON DID ESTABLISHMENT OF DID WITH ESSA SERVICE			1.0000						
30	FASTER SIGNALING ON DID EACH ADDL 20 NUMBERS			1.0000						
31	FASTER SIGNALING ON DID OR DID/DOD TRK TERMINATION INCL DIAL PULSE SIGNALING			1.0000						
32	FASTER SIGNALING ON DID DTMF SIGNALING			0.9999						
33	FASTER SIGNALING ON DID DMF SIGNALING			0.9999						
34	MAKE BUSY PER KEY ARRANGEMENT			1.0013						
35	MAKE BUSY PER CUSTOMIZED CENTRAL OFFICE ANNOUNCEMENT			1.0000						
36	800 SERVICE TO DID EST OF DID W/WATS LINE			1.0000						
37	800 SERVICE TO DID EACH ADDL 20 NUMBERS			1.0000						
38	800 SERVICE TO DID OR DID/DOD TRK TERM INCL DIAL PULSE SIGNALING			1.0000						
39	800 SERVICE TO DID DTMF SIGNALING			0.9999						
40	800 SERVICE TO DID MF SIGNALING			0.9815						
41	BCLID			1.0000						
42	SCN			0.9984						

NOTES:

* SOURCE: ONA TRP CHART "RATIO" LN 3 / CHART "UNIT" LN 9.
** BSE LETTERS IN PARAENTHESES REFER TO COLUMNS ON ONA TRP CHART UNIT.
*** BSES C,D,I,K,L,N,O,P,AF,AG,AH,AJ,AK,AN AND AO ARE INCLUDED IN CHART UNIT BUT WERE NOT OFFERED BY ANY CARRIER OUTLINED RATIOS DEVIATE SIGNIFICANTLY FROM THE NORM AND REQUIRE EXPLANATION.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-124

In the Matter of

Virgin Islands Telephone Corporation — Transmittal No. 6

Tariff F.C.C. No. 1

Switched and Special Access Rate Adjustments

ORDER

Adopted: April 15, 1992; Released: April 17, 1992

By the Deputy Chief (Policy), Common Carrier Bureau:

1. In an Order adopted November 5, 1991, the Commission found that the traffic sensitive switched access and special access rates charged by the Virgin Islands Telephone Corporation (Vitelco) between January 2, 1990 and June 30, 1990 were unlawful to the extent those rates exceeded rates in effect prior to January 2, 1990. The Commission therefore ordered Vitelco to issue refunds with interest within 60 days of the release of the *December 16 Order*.[1] The Commission also directed Vitelco to file a report describing Vitelco's efforts to effectuate these refunds within 30 days of the release of that Order.

2. On January 3, 1992, Vitelco filed a motion to stay the reporting and the refund requirements imposed by the Commission in the *December 16 Order*. Vitelco sought the stay pending reconsideration of the refund by the Commission or judicial review. The Common Carrier Bureau has previously extended the deadline for the refund and the reporting requirements[2] in order to provide further time to consider Vitelco's stay request and other related pleadings.[3] That deadline now expires April 24, 1992. In this Order, and for the same reasons, we again extend the deadline. In so doing, we are relying on the equitable discretion given the Commission under Section 705 of the Administrative Procedure Act, 5 U.S.C. § 705, and Section 4(i) of the Communications Act, 47 U.S.C. § 154(i).

3. Accordingly, IT IS ORDERED pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i), that the deadline for the Virgin Islands Telephone Corporation to file a refund report with the Commission and to effectuate the refunds ordered by the Commission in the above-captioned docket, IS EXTENDED until **May 22, 1992.**

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

[1] Virgin Islands Telephone Corporation, CC Docket No. 90-124, Memorandum Opinion and Order, 6 FCC Rcd 7350 (1991) (*December 16 Order*).

[2] *See* Virgin Islands Telephone Corporation, CC Docket No. 90-124, Order, 7 FCC Rcd 2166 (Com.Car.Bur. 1992); *see also* Virgin Islands Telephone Corporation, CC Docket No. 90-124, Order, 7 FCC Rcd 1444 (Com.Car.Bur. 1992); Virgin Islands Telephone Corporation, CC Docket No. 90-124, Order, 7 FCC Rcd 711 (Com.Car.Bur. 1992).

[3] On January 10, AT&T filed an opposition to Vitelco's motion for stay. On January 16, Vitelco filed a motion to accept its late-filed reconsideration petition. AT&T filed its opposition to Vitelco's motion on January 23; Vitelco filed its reply on January 31, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Newport News Cablevision, Ltd.
Communications, Inc.,
Complainant,

v. PA-87-0006

Virginia Electric and Power Company,
d/b/a Virginia Power,
Respondent

ORDER

Adopted: April 16, 1992; Released: April 27, 1992

By the Deputy Chief (Operations), Common Carrier Bureau:

I. INTRODUCTION

1. On March 27, 1987, Newport News Cable, Ltd. Communications, Inc. (Newport News or Complainant) filed a complaint against Virginia Electric and Power Company (VEPCO) alleging that VEPCO was using a contractual provision in their pole attachment agreement to impose an unreasonable practice upon Newport News. Specifically, Newport News claims that VEPCO instituted an unreasonable inspection of complainant's cable attachments to VEPCO's poles and charged Newport News for the full cost of the inspection. Newport News requests the Commission, pursuant to its authority under Section 224 of the Communications Act of 1934,[1] as amended, to terminate this unreasonable practice and to order VEPCO to refund amounts it has paid for this inspection. For the reasons stated below, we grant in part this petition.

II. BACKGROUND

2. In 1986, VEPCO began an inspection of the pole attachments at issue here. In that same year, Hampton Roads Cablevision, the owner of the pole attachments, assigned its rights in its pole attachment contract with VEPCO to Newport News. This contract contains a provision which allows VEPCO to inspect, at complainant's expense, complainant's installations on, or in the "vicinity" of, VEPCO's poles, lines, and appliances for safety reasons and for compliance with the contract.[2] VEPCO continued its inspection after the assignment to Newport News was completed and throughout 1987.[3] The inspection has never been completed.

3. On March 27, 1987, Newport News filed this complaint claiming that VEPCO's inspection practice was unreasonable. The complaint raises three issues: (1) the reasonableness of the inspection procedures; (2) the reasonableness of the safety standards applied; and (3) the reasonableness of the costs of the inspection. After several attempts by the parties to settle the complaint, VEPCO filed a response on December 12, 1990.[4] Newport News filed its reply on February 7, 1991.

III. DISCUSSION

4. No party challenges the Commission's jurisdiction. Section 224(b)(1) states that the Commission "shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable."[5] Congress, in enacting Section 224, recognized that Commission involvement in pole attachment matters would include the review of "pole attachment practices."[6] We find that the "conditions" of pole attachments include both the reasonableness of contract provisions and the reasonableness of pole owner practices in implementing such provisions.

A. The Inspection

1. Positions of the parties

5. Newport News complains that VEPCO has undertaken this inspection, not for reasons related to cable, but as a means to reengineer VEPCO's own plant. This, Newport News claims, is unreasonable.[7] Newport News contends that, even if the inspection has some relationship to cable pole attachments, the inspection procedures used were unreasonable. Specifically, Newport News states that VEPCO's inspection of pole attachments on all poles, regardless of ownership,[8] and VEPCO's detailed, physical measurements of clearances between all attachments on

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[1] 47 U.S.C. § 224. Section 224 states that "the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. § 224(b)(1).

[2] Newport News Complaint at Exhibit A, para. 25. VEPCO invoked this same provision to begin the inspection when Hampton Roads Cablevision was a party to the contract.

[3] There is a factual dispute between the parties as to when the inspection was discontinued; however, evidence reveals that it continued at least through May, 1987.

[4] The Commission delayed action on the complaint following a successful constitutional challenge to Section 224. Florida Power Corp. v. FCC, 772 F.2d 1537 (11th Cir. 1985). Following the Supreme Court's reversal of that decision, FCC v. Florida Power Corp., 480 U.S. 245, 107 S. Ct. 1107 (1987), the Commission began processing pole attachment complaints. Pleading Schedule Established for Amending or Updating Pending Pole Attachment Complaints, *Public Notice*, 3 FCC Rcd 189 (1988).

[5] 47 U.S.C. § 224(b)(1).

[6] The Senate report on what became present Section 224 states that Commission involvement was intended to "minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public." S. Rep. No. 580, 95th Cong., 1st Sess. at 14 (1977), reprinted in 1978 U.S. Code Cong. & Admin. News 109.

[7] Newport News Complaint at 5.

[8] Newport News states that it "independently rents C&P Telephone poles from C&P, which is responsible for clearances on its own poles." Newport News Reply at 12-13. VEPCO's inspection included attachments on C&P poles.

poles were unreasonable.[9] Industry standards, according to Newport News, dictate visual measurements of clearances, unless it is "too close to call."[10] Newport News also maintains that, through these inspection practices, other pole users benefit at its expense. Complainant argues that it should not bear the full cost of the inspection because the inspection was beneficial to other pole users, and industry standard would allocate the costs among all pole users.[11] Moreover, Newport News questions the actual charges included in the inspection costs, particularly VEPCO's use of an "overhead additive."[12]

6. VEPCO denies that it undertook the inspection as a means to reengineer its own plant. Rather, VEPCO states, a test inspection program of cable attachments it conducted revealed widespread safety violations by cable, and led to its statewide inspection program, including the Newport News inspection.[13] VEPCO also claims that its inspection procedures were not unreasonable because (1) it must use a "high degree of care" to prevent injury in its distribution of electricity,[14] and (2) it sought to detect and correct all cable safety violations.[15] VEPCO disagrees with Newport News that it should bear any of the costs of the inspection, arguing that the inspection revealed safety problems related *"solely"* to cable.[16] VEPCO also defends its use of an "overhead additive" by stating that its practice is to charge for indirect costs incurred in the course of private work because its ratepayers should not bear the burden of any costs related to such work.[17]

7. Separate from the inspection costs and practices, Newport News argues that the safety standards VEPCO applied during the inspection were unreasonable and more stringent than that required by the NESC. Newport News particularly objects to VEPCO's guying requirement[18] which would have Newport News guy its attachments at every place that VEPCO guys."[19] VEPCO maintains that the safety standards applied during the inspection were reasonable. Specifically, VEPCO states that its guying standard was consistent with the NESC, and avoided onerous calculations necessary to determine if the cable attachments were in full compliance with the NESC.[20]

2. Discussion

a. Inspection practices and costs

8. An underlying principle of Commission regulation of pole attachments, based on Congressional mandate and judicial interpretation, is that costs incurred in regard to poles and their attachments which result in a benefit should be borne by the beneficiary.[21] Thus, the Commission has determined that costs incurred for the benefit of other users (not just cable) should be allocated among the beneficiaries.[22] Based on this determination, we find that the reasonableness of the cost of the inspection is tied to the reasonableness of the inspection practices. Any costs of an inspection designed only to inspect cable attachments should be borne by the cable company. However, an inspection designed to yield information about more than cable attachments and thus to benefit other pole users should not be paid for solely by the cable company. Conversely, inspection practices that would be reasonable if the costs of the inspection were shared may be unreasonable if cable pays the entire cost of the inspection.

9. After careful review of the record, we find that the inspection practices were a benefit to non-cable pole users and owners, and thus, the costs of the inspection must be allocated among the beneficiaries.[23] Therefore, we require the parties to negotiate in good faith a reasonable settlement allocating the costs of the inspection. To this end, we offer guidance on our view of what would be unreasonable if Newport News were to be made to pay 100% of the costs of this inspection. This guidance should also be useful should this inspection continue at a future date.

10. Newport News takes issue, not with VEPCO's right to inspect, but with VEPCO's alleged use of this right to reengineer its plant at cable expense. We cannot agree

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[9] These measurements were of clearance between cable lines and the ground and clearance between cable lines and electric lines (and telephone lines in some cases). The parties contractually agreed to abide by clearance standards found in the National Electric Safety Code (NESC).

[10] Newport News Complaint at 6-8 and Exhibit D, para. 8 (Joint Statement of Lawrence Loyd and Charles White).

[11] *Id.* at 9 and Exhibit D, para. 3 (Statement of John Lewis). *See also* Newport News Reply at 19.

[12] An overhead additive is a charge to a third party which is used to allocate indirect costs to the third party resulting from work performed for that third party by the utility. For example, costs of office supplies may be indirect costs of performing pole attachment inspections. Newport News argues that there should be no "markup" (overhead additive), or not more than 10% when independent contractors do the work, *citing* New York State Cable Television Ass'n - Investigation of Pole Attachment and Related Agreements between Utilities and CATV Systems, 17 N.Y. PSC 103 (1977) (*NY State Cable*).

[13] VEPCO Response at 34-35.

[14] *Id.* at 33-34.

[15] *Id.* at 15.

[16] *Id.* at 46 (emphasis in original).

[17] *Id.* at 51.

[18] Newport News also takes issue with VEPCO's anchor requirements. It appears, however, that the parties have reached an agreement on this issue, and we believe it in the parties' and the public's best interest to accept the agreement. Newport News Reply at Exhibit F, Attachment 2 (Letter from Alan Bradshaw, VEPCO to Nick Kincaid, Newport News, dated September 7, 1990).

[19] Newport News Complaint at 11-13. "Guying" refers to the use of guy wires, extending from the pole to the ground, to support the pole, *i.e.*, to offset the stress the pole must endure from the attached wires.

[20] *Id.* at 42. Moreover, VEPCO claims that the interpretive committee for the NESC, "affirmed [VEPCO's] interpretation of the NES [sic] guying requirements." *Id. See also Id.* at Attachment 1, Exhibit L.

[21] *See* Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, *Report and Order*, 2 FCC Rcd 4387, *recon.*, 4 FCC Rcd 468 (*Alabama Power Remand Order*). *See also* Alabama Power Co. v. FCC, 773 F.2d 362 (D.C. Cir. 1985) (*Alabama Power*).

[22] *See Alabama Power Remand Order*, 2 FCC Rcd at 4390, paras. 18 and 24. *See also* Adoption of Rules for the Regulation of Cable Television Pole Attachments, *Second Report and Order*, 72 FCC 2d 59, 73 (1979).

[23] We recognize that non-VEPCO/non-cable pole users and owners may have received a benefit from this inspection. However, because they are not parties to this proceeding, we will not require allocation of the costs among them. Moreover, although we leave to VEPCO and Newport News the task of determining the appropriate allocation, we would not anticipate that Newport News bear the costs of the inspection which benefitted non-VEPCO/non-cable pole users and owners.

with Newport News's characterization of the inspection. The record demonstrates that VEPCO, through a test pilot survey of cable attachments, found a number of safety violations which led it to begin a much larger inspection program, including the Newport News inspection.[24] Moreover, VEPCO states, and Newport News does not dispute,[25] that VEPCO did not perform initial post-construction inspections of cable attachments before 1985; the Newport News pole attachment agreement is dated January 1, 1984.[26] Therefore, we find that because VEPCO did not conduct an initial post-construction inspection, and had a reasonable basis for conducting a later inspection, *i.e.*, legitimate safety concerns, its later inspection is not unreasonable.

11. We do, however, find that certain inspection procedures employed by VEPCO would be unreasonable if Newport News were to pay for the full cost of the inspection. Specifically, we find that VEPCO's detailed, physical measurements of clearances between attachments is unreasonable.[27] These detailed, physical measurements determine more than cable safety violations. VEPCO's own submissions demonstrate that such detailed measurements yield information concerning safety problems of all pole users.[28] This is a benefit to non-cable pole users because they can learn about their own safety problems at cable's expense.[29]

12. We also find that VEPCO's inspection of all poles, regardless of ownership, benefits VEPCO and non-VEPCO pole owners, and would be an unreasonable inspection practice if cable were to pay for the full cost of the inspection. VEPCO benefits from the inspection of all poles because it updates or verifies its records on pole ownership, and because it learns of its safety violations on other pole owners' poles without incurring additional inspection costs that might arise with a non-VEPCO pole owner inspection. A non-VEPCO pole owner benefits from this inspection practice because VEPCO's inspection ensures safety compliance on the non-VEPCO owner's pole for which that owner has a legal responsibility.[30]

13. Although we recognize that VEPCO must meet a strict legal standard of care in its distribution of electricity, and to that end, is concerned with safety standard compliance (including safety compliance on poles it does not own, but is attached) this does not mitigate the benefit to non-cable pole users.[31] Moreover, we are concerned that Newport News could be subjected to another inspection of the same poles VEPCO inspected by non-VEPCO pole owners; paying twice for the full cost of inspection of the same pole would be unreasonable.

14. Based on these findings, we conclude that the inspection costs should be allocated among the beneficiaries of the inspection. We cannot pass on the reasonableness of VEPCO's overhead additive because Newport News has not met its threshold burden of providing the necessary data and information to support its arguments that the additive is unjust and unreasonable.[32] Although Newport News attempts to show what a reasonable additive would be by citing the *NY State Cable* decision, that case is not dispositive of the issue before us. The *NY State Cable* decision differentiates between pre-construction costs and postconstruction costs, holding only that pre-construction costs could not include an overhead additive. The post-construction costs, which include this type of inspection, were to be recovered through the annual license fee, but the state commission did not explain the components of that fee. Thus, the case sheds no light on the question of how to calculate the indirect costs of a pole inspection program.[33]

b. Safety standards

15. Newport News also complains of the safety standards applied during the inspection. Because we view these safety standards separate from the inspection costs and prac-

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[24] VEPCO Response at Affidavit of Charles R. Rhodes, pp. 13, 15-17, Exhibits G and H.

[25] In its Reply, Newport News sets forth the steps it takes in building a cable system, including initial post-construction inspections with pole owners, but does not claim that this particular cable system, which was owned by another cable company at the time it was built, followed these procedures.

[26] We understand initial post-construction inspections to be inspections conducted immediately after the cable system is built, not inspections conducted a number of years after completion of the cable system.

[27] Affiants for Newport News state that the "industry practice" is to visually inspect attachments for clearance violations and only measure the attachments when a visual inspection is too close to call. *See e.g.*, Newport News Reply at Exhibit G (Statement of Walter R. Huff) and Exhibit H (Statement of Robert F. Thomas). Although these affiants do not make clear for what industry this is "industry practice," we believe that their statements support Newport News's claim that visual inspection is commonplace. Moreover, as Newport News points out, VEPCO's own inspector states that he visually inspected some pole attachments. VEPCO Response at Attachment 6 (Affidavit of Lovic Davis).

[28] The inspection sheets used in the Newport News survey contain safety information that the inspector recorded about electric and telephone lines. *See* VEPCO Response at Attachment 2, Exhibit C.

[29] As a reasonable alternative, Newport News recommends measuring only the distance between cable lines and the ground, and between electric and cable lines. It makes another reasonable suggestion that clearance requirements can be checked from the ground by using a measuring stick on which the required clearances are marked with paint or tape.

[30] VEPCO states that as a pole owner, it is "legally responsible for maintaining the technical soundness and safety of its poles and the attachments place [sic] thereon." VEPCO Response at 46. The apparent corollary is that non-VEPCO pole owners have the same legal responsibility for their poles.

[31] Newport News, in answer to VEPCO's statements about its liability, states that it must indemnify VEPCO for losses due to Newport News's failure to meet safety standards. *See* Newport News Complaint at Exhibit A, para 14.

[32] *See* 47 C.F.R. § 1.1404(g).

[33] Newport News also attempted to prove that the actual direct costs of the inspection were inflated. However, based on the contradictory evidence presented to us by Newport News itself, we cannot conclude that these charges were inflated. Newport News's own affiant claimed that he spent 233 hours on the inspection, but another document included in Newport News's filings indicates that either 70 hours or 224 hours were spent by a Newport News employee on the inspection. *Compare* Newport News Reply at Exhibit F, Attachment 4 and Exhibit F at 9. Therefore, we find that Newport News has not met its threshold burden of providing the necessary information to support its argument. 47 C.F.R. § 1.1404(g).

tices, we pass on their reasonableness separately. We do not find VEPCO's guying requirement for its own poles so onerous as to be unreasonable. Although Newport News provides some evidence of the telephone industry's standard for guying, it does not provide the same for the electric industry.[34] VEPCO presents a persuasive argument that its guying standard, given its legitimate safety concerns, was reasonable because it was less onerous than the complex calculations that would need to be performed to determine if guying was necessary for safety reasons.[35] Moreover, the interpretive body of NESC does not disagree with VEPCO's guying standard.[36]

16. However, VEPCO's guying requirement for poles it does not own was unreasonable. There is evidence that Newport News must follow a different guying standard on telephone poles.[37] We will not require Newport News to violate any terms of other pole attachment agreements.[38]

17. Although Newport News suggests that the clearance standards VEPCO followed during the inspection were unreasonable, we cannot so conclude. VEPCO and Newport News agreed to follow NESC standards under the terms of the contract. This provision is not unreasonable and should be adhered to by the parties. However, there appears to be some misunderstanding by the parties as to when different NESC rules went into effect; the record before us does not allow us to resolve this issue. We suggest that the parties seek clarification of the effective dates for the NESC rules from the NESC Committee of the IEEE.

B. Other Matters

18. Newport News requests attorney's fees and punitive damages based on VEPCO's alleged pattern of abuse. VEPCO states that parties to a formal complaint proceeding before the Commission "may not be awarded attorney's fees."[39] VEPCO also claims that Newport News cannot be awarded punitive damages because (1) the Commission has never awarded punitive damages to a party and (2) punitive damages are not warranted under the circumstances of this case.

19. In light of prior Commission decisions, we cannot award attorney's fees to Newport News.[40] Although we do not decide our authority to award punitive damages, we do not believe that punitive damages are warranted in this case. Newport News has failed to show even "a hint of wanton, oppressive or malicious intent or of incompetence or recklessness" by VEPCO.[41]

C. Remedies

20. We require Newport News and VEPCO to negotiate in good faith a settlement allocating the costs of the inspection based on the guidance set out *supra*.[42] We also require Newport News and VEPCO to negotiate in good faith settlement compensating Newport News for the costs it incurred, if any, for the installation on poles not owned by VEPCO of guying that was not required by the terms of Newport News's pole attachment agreements with the pole owners. In anticipation of the continuance of this inspection, we require VEPCO to devise a method for measuring only cable safety problems if it wishes to charge cable with the full cost of the survey.[43]

ORDERING CLAUSE

21. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), and 224 of the Communications act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 224, and Sections 0.91(j) and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91(j), 0.291, Newport News's Complaint IS GRANTED to the extent indicated above, and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief (Operations)
Common Carrier Bureau

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[34] Newport News Reply at 26-27, and Exhibits E and G.

[35] VEPCO Response at Attachment 4, pp. 22-24.

[36] In an interpretation letter, the interpretative body found that the "NESC generally requires guying to take all assumed horizontal forces and the wood or reinforced-concrete pole to act only as a strut." NESC Committee of the IEEE (issued September 21, 1987). This interpretation supports VEPCO's contention that once it guys, the pole acts only as a strut and no longer supports horizontal tension.

[37] VEPCO Response at Attachment 4, pp. 24-25, Newport News Reply at 26-27.

[38] Again, we recognize VEPCO's concerns over its legal duty in regard to distribution of electricity and thus its safety concerns, but we are not in a position to reconcile two different contracts when one of them is not before us. Although we do not require it, we suggest that Newport News and the pole owners with whom it has agreements reach a compromise on this issue.

[39] VEPCO Response at 54.

[40] Comark Cable Fund III v. Northwestern Indiana Telephone Co, *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture*, 100 FCC 2d 1244, 1257, n. 51, *citing* Strouth v. Western Union, 70 FCC 2d 506, 511, 567 (1978) and Illinois Bell Telephone Co., FCC 80M-181 (released January 30, 1980), 46 R.R. 2d 1449(1980).

[41] Strouth v. Western Union Telegraph Co., *Initial Decision*, 70 FCC 2d 525, 570 (1977), *aff'd in relevant part*, 70 FCC 2d 506 (Rev. Bd. 1978).

[42] The parties should report the results of their negotiations to the Chief, Accounting and Audits Division, within 60 days of release of this Order. Should the parties be unable to reach an agreement, they should report this to the Chief, Accounting and Audits Division, within the sixty day period, and we will determine a just and reasonable apportionment of costs.

[43] We find, as a "safe harbor" for charging Newport News the full cost of an inspection, that measuring from the ground (1) the distance between electric and cable lines, and (2) the distance between cable lines and the ground, should sufficiently uncover cable safety problems. Although VEPCO suggests that clearance distances cannot be determined by this method, *i.e.*, the numbers cannot be read from the ground, we believe that Newport News's suggestion of painting or taping the measuring stick at the predetermined clearance requirements solves the problem. Also, we find that the inspection of mid-span clearance between a non-VEPCO and VEPCO pole is reasonable and within the language of the contract, and therefore, chargeable to cable.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

First Commonwealth
Communications, Inc.,
Complainant,

v. PA-85-0016

Virginia Electric and
Power Company
d/b/a Virginia Power
Company
Respondent.

ORDER

Adopted: April 16, 1992; Released: April 27, 1992

By the Deputy Chief (Operations), Common Carrier Bureau:

I. INTRODUCTION

1. On August 12, 1985, First Commonwealth Communications, Inc. (First Commonwealth or complainant) filed a complaint against Virginia Electric and Power Company (VEPCO) alleging that VEPCO was using a contractual provision in their pole attachment agreement to impose an unreasonable practice upon First Commonwealth. Specifically, First Commonwealth claims that VEPCO instituted an unreasonable inspection of complainant's cable attachments to VEPCO's poles and charged First Commonwealth for the full cost of the inspection. First Commonwealth requests the Commission, pursuant to its authority under Section 224 of the Communications Act of 1934,[1] as amended, to terminate this unreasonable practice and to order VEPCO to refund amounts it has paid for this inspection. For the reasons stated below, we grant in part this petition.

II. BACKGROUND

2. In 1985, VEPCO notified First Commonwealth of its intention to inspect the pole attachments at issue here, invoking a contract provision to allow inspection, at complainant's expense, of complainant's installations on, or in the "vicinity" of, VEPCO poles, lines, and appliances for safety and for compliance with the contract.[2] The inspection began in April, 1985, and was completed in December, 1986.[3] According to VEPCO, the total amount charged to First Commonwealth for the inspection was $14,480.[4]

3. On August 12, 1985, First Commonwealth filed this complaint claiming that VEPCO's inspection practice was unreasonable. The complaint raises three issues: (1) the reasonableness of the inspection procedures; (2) the reasonableness of the safety standards applied; and (3) the reasonableness of the costs of the inspection.[5] After several attempts by the parties to settle the complaint, the Bureau allowed filings to supplement the record.[6] VEPCO filed a supplemental response on December 3, 1990.

III. DISCUSSION

4. No party challenges the Commission's jurisdiction. Section 224(b)(1) states that the Commission "shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable."[7] Congress, in enacting Section 224, recognized that Commission involvement in pole attachment matters would include the review of "pole attachment practices."[8] We find that the "conditions" of pole attachments include both the reasonableness of contract provisions and the reasonableness of pole owner practices in implementing such provisions.

A. The Inspection

1. Positions of the Parties

5. First Commonwealth complains that VEPCO undertook this inspection, not for reasons related to cable, but as a means to reengineer VEPCO's own plant. This,

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[1] 47 U.S.C. § 224. Section 224 states that "the Commission shall regulate the rates, terms, and conditions for pole attachment to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. § 224(b)(1).

[2] First Commonwealth Complaint at Exhibit A, para. 24.

[3] VEPCO Supplemental Response at Affidavit of Lovic E. Davis, p. 2, and Affidavit of Charles R. Rhodes, p. 2.

[4] VEPCO states that this amount does not include the cost to First Commonwealth of correcting safety violations discovered during the inspection. *Id.* at Affidavit of Charles R. Rhodes, pp. 4-5. First Commonwealth does not dispute VEPCO's figure.

[5] On September 12, 1985, Vista Cablevision Inc. (Vista), moved to intervene in this proceeding, but later sought to withdraw. Both VEPCO and First Commonwealth filed pleadings that addressed Vista's filing. However, since the Bureau accepts Vista's Motion to Withdraw, the pleadings filed by VEPCO and First Commonwealth on Vista's pleading will not be considered.

[6] The Commission delayed action on the complaint following a successful constitutional challenge to Section 224. Florida Power Corp. v. FCC, 772 F.2d 1537 (11th Cir. 1985). Following the Supreme Court's reversal of that decision, FCC v. Florida Power Corp., 480 U.S. 245, 107 S. Ct. 1107 (1987), the Commission began processing pole attachment complaints. Pleading Schedule Established for Amending or Updating Pending Pole Attachment Complaints, *Public Notice*, 3 FCC Rcd 189 (1988).

[7] 47 U.S.C. § 224(b)(1).

[8] The Senate report on what became present Section 224 states that Commission involvement was intended to "minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public." S. Rep. No. 580, 95th Cong., 1st Sess. at 14 (1977), reprinted in 1978 U.S. Code Cong. & Admin. News 109.

First Commonwealth claims, is unreasonable.[9] First Commonwealth contends that, even if the inspection had some relationship to cable, the inspection procedures used were unreasonable. Specifically, VEPCO's inspection of pole attachments on all poles, regardless of ownership, and VEPCO's detailed, physical measurements of clearances between all attachments on poles were unreasonable.[10] Industry standards, according to First Commonwealth, dictate visual measurements of clearances, unless it is "too close to call."[11] First Commonwealth also maintains that, through these inspection practices, other pole users benefit at its expense. Complainant argues that it should not bear the full cost of the inspection because the inspection was beneficial to other pole users, and industry standards would allocate the costs among all pole users.[12] Moreover, First Commonwealth questions VEPCO's use of an "overhead additive."[13]

6. VEPCO denies that it undertook the inspection as a means to reengineer its own plant. Moreover, VEPCO states that the reasonableness of undertaking the inspection was "borne out" by the number of safety violations found on the poles to which First Commonwealth had attached its equipment.[14] VEPCO also claims that its inspection procedures were not unreasonable because they were necessary to detect and correct all cable safety violations that could cause service disruptions and safety hazards.[15] VEPCO implies that, because the inspection was solely related to cable, it should not bear any inspection costs. VEPCO also defends its use of an "overhead additive" by stating that its practice is to charge for indirect costs incurred in the course of private work because its ratepayers should not bear the burden of any costs related to such work.[16]

7. First Commonwealth also argues that the safety standards VEPCO applied during the inspection were unreasonable and more stringent than that required by the NESC, particularly VEPCO's guying requirement which would have First Commonwealth guy its attachments at every place VEPCO guys.[17] VEPCO maintains that the safety standards applied during the inspection were reasonable. Specifically, VEPCO states that First Commonwealth must guy its cable wherever electrical conductors are guyed.[18]

2. Discussion

a. Inspection Practices and Costs

8. An underlying principle of Commission regulation of pole attachments, based on Congressional mandate and judicial interpretation, is that costs incurred in regard to poles and their attachments which result in a benefit should be borne by the beneficiary.[19] Thus, the Commission has determined that costs incurred for the benefit of other users (not just cable) should be allocated among the beneficiaries.[20] Based on this determination, we find that the issues presented cannot be resolved in isolation. Rather, the reasonableness of the cost of the inspection is tied to the reasonableness of the inspection practices and safety standards. Any costs of an inspection designed only to inspect cable attachments should be borne by the cable company. However, an inspection designed to yield information about more than cable attachments, and thus to benefit other pole users, should not be paid for solely by the cable company. Conversely, inspection practices that would be reasonable if the costs of the inspection were shared may be unreasonable if cable pays for the entire inspection.

9. After careful review of the record, we find that the inspection practices were a benefit to non-cable pole users and owners, and thus, the costs of the inspection must be allocated among the beneficiaries.[21] Therefore, we require the parties to negotiate in good faith a reasonable settlement allocating the costs of the inspection. To this end, we offer guidance on our view of what would be unreasonable if First Commonwealth were to be made to pay 100% of the costs of this inspection.

10. First Commonwealth takes issue, not with VEPCO's right to inspect, but with VEPCO's alleged use of this right to reengineer its plant at cable expense. We cannot agree

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[9] First Commonwealth Complaint at 6-9.

[10] *Id.* at 6. These measurements were of clearance between cable lines and the ground and clearance between cable lines and electric lines (and telephone lines in some cases). The parties contractually agreed to abide by clearance standards found in the National Electric Safety Code (NESC).

[11] First Commonwealth Complaint at 6 and Exhibit C, paras. 5 and 8 (Joint Statement of Lawrence Loyd and Charles White).

[12] First Commonwealth Complaint at 9.

[13] An overhead additive is a charge to a third party which is used to allocate indirect costs to the third party resulting from work performed for that third party by the utility. For example, costs of office supplies may be indirect costs of performing pole attachment inspections. First Commonwealth argues that there should be no "markup" (overhead additive), or not more than 10% when independent contractors do the work, *citing* New York State Cable Television Ass'n - Investigation of Pole Attachment and Related Agreements between Utilities and CATV Systems 17 NY PSC 103 (1977) (*NY State Cable*).

[14] VEPCO Response at 3 and 6. *See also* VEPCO Supplemental Response at Affidavit of Charles R. Rhodes, p. 3 ("Of the 4,176 poles inspected, violations of safety requirements of the National Electrical Safety Code or Virginia Power construction standards were found on 1,952 poles -- approximately 46% of the total poles surveyed.") *Id.*

[15] VEPCO Response at 4-7. *See also* VEPCO Supplemental Response at 2-3.

[16] VEPCO Response at 9.

[17] First Commonwealth Complaint at 11-13. "Guying" refers to the use of guy wires, extending from the pole to the ground, to support the pole, *i.e.*, to offset the stress the pole must endure from the attached wires.

[18] VEPCO Response at 7, *citing* NESC § 261.

[19] *See* Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, *Report and Order*, 2 FCC Rcd 4387, *recon.*, 4 FCC Rcd 468 (*Alabama Power Remand Order*). *See also* Alabama Power Co. v. FCC, 773 F.2d 362 (D.C. Cir. 1985) (*Alabama Power*).

[20] *See Alabama Power Remand Order*, 2 FCC Rcd at 4390, paras. 18 and 24. *See also* Adoption of Rules for the Regulation of Cable Television Pole Attachments, *Second Report and Order*, 72 FCC 2d 59, 73 (1979).

[21] We recognize that non-VEPCO/non-cable pole users and owners may have received a benefit from this inspection. However, because they are not parties to this proceeding, we will not require allocation of the costs among them. Moreover, although we leave to VEPCO and First Commonwealth the task of determining the appropriate allocation, we would not anticipate that First Commonwealth bear the costs of the inspection which benefitted non-VEPCO/noncable pole users and owners.

with First Commonwealth's characterization of the inspection. The record demonstrates that VEPCO, through a test pilot survey of cable attachments, found a number of safety violations which led it to begin a much larger inspection program, including the First Commonwealth inspection.[22] We find, that this inspection was based on legitimate safety concerns and is therefore, not unreasonable.

11. We do, however, find that certain inspection procedures employed by VEPCO would be unreasonable if First Commonwealth were to pay for the full cost of the inspection. Specifically, we find that VEPCO's detailed, physical measurements of clearances between attachments is unreasonable. These detailed, physical measurements determine more than cable safety violations. VEPCO's own submissions demonstrate that such detailed measurements yield information concerning safety problems of other pole users.[23] This is a benefit to non-cable pole users because they can learn about their own safety problems at cable's expense. Moreover, VEPCO's own inspector indicates that visual inspections are reasonable.[24]

12. We also find that VEPCO's inspection of all poles, regardless of ownership, benefits VEPCO and non-VEPCO pole owners, and is an unreasonable inspection practice if cable pays for the full cost of the inspection. VEPCO benefits from the inspection of all poles because it updates or verifies its records on pole ownership and learns of its safety violations on other pole owners' poles without incurring additional inspections costs that might arise with a non-VEPCO pole owner inspection. The non-VEPCO pole owner benefits because VEPCO's inspection ensures safety compliance on the non-VEPCO owner's pole for which that owner has a legal responsibility.[25] VEPCO's inspection of poles it does not own also raises concerns that First Commonwealth could be subjected to another inspection of the same poles VEPCO inspected by a non-VEPCO pole owner; paying twice for inspection of the same pole is unreasonable.

13. We have already found that the inspection costs should be allocated among the beneficiaries of the inspection. We cannot pass on the reasonableness of VEPCO's overhead additive because First Commonwealth has not met its threshold burden of providing the necessary data and information to support is arguments that the additive is unjust and unreasonable.[26] Although First Commonwealth attempts to show what a reasonable additive would be by citing the *NY State Cable* decision, that case is not dispositive of the issue before us. The *NY State Cable* decision differentiates between pre-construction costs and post-construction costs, holding only that pre-construction costs could not include an overhead additive. The post-construction costs, which include this type of inspection,[27] were to be recovered through the annual license fee, but the state commission did not explain the components of that fee. Thus, the case sheds no light on the question of how to calculate the indirect costs of a pole inspection program.

b. Safety Standards

14. We do not find VEPCO's guying requirement for its own poles so onerous as to be unreasonable. Although First Commonwealth provides some evidence that guying, in certain instances, may be discretionary, it does not provide evidence that VEPCO's guying requirements are at odds with the electrical industry standard.[28]

15. However, VEPCO's guying requirement for poles it does not own was unreasonable. As noted previously, it seems apparent that other pole owners are responsible for the safety standards on their own poles.[29] Moreover, First Commonwealth may have different terms under its contract with the other pole owner; we will not require First Commonwealth to violate any terms of other pole attachment agreements.[30]

B. Other Matters

16. First Commonwealth requests attorney's fees and punitive damages based on VEPCO's alleged pattern of abuse. In light of prior Commission decisions, we cannot award attorney's fees to First Commonwealth.[31] Although we do not decide our authority to award punitive damages, we do not believe that punitive damages are warranted in

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[22] VEPCO Supplemental Response at Affidavit of Charles R. Rhodes, p. 2 and Exhibit A.

[23] The inspection sheets used in the First Commonwealth survey contain safety information that the inspector recorded about electric lines. *See* VEPCO Supplemental Response at Affidavit of Lovic E. Davis, Exhibit B.

[24] VEPCO Supplemental Response at Affidavit of Lovic E. Davis, p. 3 at para. 4. We note, for consideration by the parties in negotiating an allocation of inspection costs, that VEPCO's inspection sheets of the First Commonwealth attachments indicate that VEPCO did not physically measure all clearances.

[25] In another proceeding, VEPCO stated that as a pole owner it is "legally responsible for maintaining the technical soundness and safety of its poles and the attachments place [sic] thereon." *See* Newport News Cablevision v. Virginia Electric and Power, PA-87-0006, *Order*, DA 92-500, at n. 30 (adopted, April 16, 1992) (*Newport News Pole Attachment Order*). The apparent corollary is that non-VEPCO pole owners have the same legal responsibility for their poles.

[26] *See* 47 C.F.R. § 1.1404(g).

[27] The *NY State Cable* differentiates between initial post-construction inspections and periodic post-construction inspections. The VEPCO inspection was a periodic post-construction inspection.

[28] *See* First Commonwealth Complaint at 12 ("longitudinal stress requirements [a purpose for guying] 'shall be met *either* by the structure alone *or* with the aid of guys and braces.'") (emphasis in original). Moreover, under similar circumstances, we have found that, given VEPCO's concerns for safety, its guying requirements for its own poles are not unreasonable. *Newport News Pole Attachment Order*, DA 92-500 at para. 13. In that *Order*, we also noted that the interpretive body of NESC does not disagree with VEPCO's guying standard. *Id.*

[29] We recognize that VEPCO may have a legal duty of care in the distribution of electricity. However, we view any conflict between that duty and the contractual relationship between the non-VEPCO pole owner and the cable company as a matter to be resolved between VEPCO and the non-VEPCO pole owner, perhaps with the aid of the Virginia State Corporation Commission.

[30] *See Newport News Pole Attachment Order*, DA 92-500, at para. 16. In that proceeding, Newport News presented evidence of a different standard required by the telephone pole owner.

[31] Comark Cable Fund III v. Northwestern Indiana Telephone Co, *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture*, 100 FCC 2d 1244, 1257, n. 51, *citing* Strouth v. Western Union, 70 FCC 2d 506, 511, 567 (1978) and Illinois Bell Telephone Co., FCC 80 M-181 (released January 30, 1980), 46 R.R. 2d 1449(1980).

this case. First Commonwealth has failed to show even "a hint of wanton, oppressive or malicious intent or of incompetence or recklessness" by VEPCO.[32]

C. Remedies

17. We require First Commonwealth and VEPCO to negotiate in good faith a settlement allocating the costs of the inspection based on the guidance set out *supra*.[33] We also require First Commonwealth and VEPCO to negotiate in good faith a settlement compensating First Commonwealth for the costs it incurred, if any, for the installation on poles not owned by VEPCO of guying not required by the terms of First Commonwealth's pole attachment agreements with the pole owners.

ORDERING CLAUSE

18. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), and 224 of the Communications act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 224, and Sections 0.91(j) and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91(j), 0.291, First Commonwealth's Complaint IS GRANTED to the extent indicated above, and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief (Operations)
Common Carrier Bureau

[32] Stroth v. Western Union Telegraph Co., *Initial Decision*, 70 FCC 2d 525,570 (1977), *aff'd in relevant part*, 70 FCC 2d 506 (Rev. Bd. 1978).

[33] The parties should report the results of their negotiations to the Accounting and Audits Division within 60 days of release of this Order. Should the parties be unable to reach an agreement, they should report this to the Accounting and Audits Division within the sixty day period, and we will determine a just and reasonable apportionment of costs.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-167

In the Matter of

Amendment of the Maritime Services Rules (Part 80) to permit VHF Marine Channel 9 to be used as a second calling channel.

REPORT AND ORDER

Adopted: April 13, 1992; Released: April 28, 1992

By the Commission:

I. INTRODUCTION

1. In a *Notice of Proposed Rule Making* (*Notice*), 6 FCC Rcd 3484 (1991), the Commission proposed to amend Part 80 of the Commission's Rules, 47 C.F.R. Part 80, to permit the use of VHF Marine channel 9 as a second calling channel by noncommercial vessels in the Maritime Radio Services.[1] This Report and Order adopts the rule amendment to permit the use of channel 9 as a designated, second calling channel nationwide, substantially as proposed.

II. BACKGROUND

2. In the Maritime Radio Services, VHF channels in the 156-162 MHz band are used by ship stations to communicate with other ship stations or with coast stations. Channels are designated according to the type of communication and the nature of the ship's operation. For example, channels are available for safety communications, calling, control of ship movement, and navigational purposes. Channels are also available for public correspondence use. The Commission's Rules presently provide for two channels to be used for calling. Channel 70, 156.525 MHz, is available for use as an intership, ship and coast station, distress and calling frequency using Digital Selective Calling (DSC).[2] Channel 16, 156.800 MHz, is available for use as a distress, safety, and calling frequency using voice communications.[3] As such, channel 16 is intended to be used to send and receive messages pertaining to the safety of life and property. It is used extensively, however, as a calling channel, particularly by the recreational boating population. With the continuing increase in this segment of boaters, congestion on channel 16 has also increased, specifically in urban boating areas.[4] Such congestion on channel 16 lessens the likelihood that distress and safety calls will be heard by the U.S. Coast Guard (Coast Guard) and increases the likelihood that some boaters will simply turn off their VHF radios except when they want to make a radio call.

3. In the *Notice* in this proceeding, we noted that one way to reduce congestion on channel 16, thus making it easier for the Coast Guard to hear distress calls, would be to permit the use of a second channel for calling purposes. We noted that the Coast Guard concurred with this concept as an interim measure pending full implementation of DSC calling. Further, this concept of using a second calling channel to increase maritime safety is supported by the Chairman of the Subcommittee on Coast Guard and Navigation.[5] We proposed, therefore, to permit routine calling by private coast stations and noncommercial vessels, either intership, ship to coast, or coast to ship, on channel 9. We specified that commercial vessels should

[1] In the Maritime Radio Services, a calling channel is used as a gateway to other working channels. That is, a ship listens on the designated calling channel for a call, acknowledges the call on that channel and then switches to a working channel to continue the communication.

[2] Digital selective calling (DSC) is a digital signalling system that automatically allows ship and shore stations to call one another directly, similar to the use of a telephone, and establish contact. It is a significant improvement over the current method of establishing radio contact which requires a ship radio operator to listen continuously to a common calling channel and to identify a specific call directed to the ship. The DSC system, therefore, promotes additional safety and more efficient use of the spectrum. Although not generally available to the maritime community at this time, DSC will eventually be an integral part of the Global Maritime Distress and Safety System (GMDSS). *See Report and Order*, FCC 92-19, Adopted January 16, 1992.

[3] All vessels equipped with VHF stations for compliance with the Communications Act of 1934, as amended (Communications Act), the International Convention for the Safety of Life at Sea, 1974, T.I.A.S. 9700, or the Agreement Between Canada and the United States for the Promotion of Safety on the Great Lakes by Means of Radio, T.I.A.S. 7837, amended T.I.A.S. 9352, are required to maintain a watch on channel 16. Vessels voluntarily equipped with VHF stations, such as recreational boats, are required to maintain a watch on channel 16 when the station is turned on and not being used for other traffic. The United States Coast Guard maintains an aural watch on channel 16 and makes preliminary announcements of maritime safety broadcasts.

[4] Recreational boats typically are not required by Commission regulation to carry marine VHF radio equipment. Such vessels, however, often do, on a voluntary basis, carry such equipment and use the maritime VHF channels for communications. There are currently over 600,000 voluntary ship stations licensed by the Commission.

[5] On April 25, 1990, Congress introduced a bill proposing an appropriation for land-based Coast Guard search and rescue stations to enhance the capability of the Coast Guard to locate and identify marine VHF distress signals. In response to testimony by Richard M. Smith, Chief of the Field Operations Bureau, Congressman Billy Tauzin, Chairman of the Subcommittee on Coast Guard and Navigation of the Committee on Merchant Marine and Fisheries, wrote to Chairman Sikes on August 9, 1990, indicating support for implementing a second calling channel. He wrote: "By unanimous consent request, the Subcommittee has directed that I convey a message of strong support for the immediate implementation...[of this proposal]." *See* letter from Chairman, Subcommittee on Coast Guard and Navigation to Chairman, Federal Communications Commission, August 9, 1990.

continue to use channel 16 as the calling channel.[6] Finally, we emphasized that channel 16 would continue to be the primary safety and distress channel for all vessels and that the proposed use of channel 9 would be on an optional basis for noncommercial vessels.

III. DISCUSSION

4. Because we particularly were concerned about what effect, if any, permitting the use of a second calling channel would have on overall marine safety we conducted a study on the effect of using marine VHF channel 9 as a second calling channel in Boston Harbor. The study was conducted by the Commission's Boston field office in cooperation with the Coast Guard.[7] Additionally, we requested specific comments on our proposal pertaining to such use of channel 9. Comments to the *Notice* were filed by Arthur W. Miller (Miller), George F. Werner (Werner), Bradford D. Carey (Carey), the Marine Inland Transportation Company (Marine Inland), Mobile Marine Radio, Inc. (Mobile Marine), the National Marine Electronics Association (NMEA), the Department of the United States Army (Army), and the Coast Guard. Commenters responded to our request for specific comments on this issue and raised three general areas of concern: safety, nationwide use of channel 9, and commercial use of channel 9. We will discuss the results of the Boston Study and commenter's concerns in turn.

5. *Boston study.* The Boston office of the Commission's Field Operations Bureau and the Boston Group of the Coast Guard conducted a cooperative study on the effects of using channel 9 as a second calling channel in Boston Harbor throughout the 1991 boating season. Among other things, the Coast Guard and the Commission publicized the optional use of channel 9 beginning in January of 1991 through an extensive public awareness program. The Coast Guard modified its facilities to allow the broadcast of marine safety warnings on channel 9 and channel 16 during the 1991 boating season. The Commission's Boston field office conducted an in-depth study of marine VHF radio usage on channels 16 and 9 in Boston Harbor and compared the results to studies conducted in 1990.[8]

6. The results of the study are striking. Congestion on channel 16 has been reduced by almost one-half (49 per cent) during the times when usage of the channel is highest. [9] The Coast Guard reports that the use of channel 9 for calling by recreational boaters has reduced the load on channel 16, permitting it to be used for safety and distress purposes as intended. No safety problems were reported to the Coast Guard or to the Boston field office as a result of the use of channel 9 for routine calling. In fact, the Coast Guard reports that the success with channel 9 in Boston Harbor has been so great that it has requested a waiver from the Commission to permit the use of channel 9 as a second calling channel throughout the First Coast Guard District, a region that includes Boston Harbor and New York City Harbor. The Coast Guard states that it intends to implement the use of channel 9 as a second calling channel in the First District beginning April 1, 1992, if the waiver is granted.

Safety and Nationwide Use of Channel 9.

7. We proposed in the *Notice* to permit channel 9 to be used nationwide as an optional, alternate calling channel to relieve congestion on channel 16. We recognized specifically in the *Notice* that such use would not replace the use of channel 16 for distress and safety communications. The Coast Guard supports this reasoning, stating in its comments, "[a]llowing the use of channel 9 as a calling channel would reduce congestion on channel 16, thereby making it more likely that distress or safety calls will be heard."[10] Additionally, the Boston study showed that all of the observed distress and safety calls made during the monitoring period were made, correctly, on channel 16 and that channel 9 was not used for initial distress and safety calls.[11] The Coast Guard went on to state that it believes that the success of the Boston study in reducing congestion on channel 16 was due in large part to the efforts of the local FCC field office in publicizing that channel 9 was available for calling purposes and that the same intensity of effort must be duplicated in other congested areas to make the use of channel 9 as a second calling channel successful.

8. Miller, Werner and Carey oppose permitting the use of a second calling channel. All three express concern with the proposal to delete the requirement that voluntarily equipped noncommercial vessels monitor channel 16 and instead be permitted to monitor channel 9. The commenters suggest that this provision would decrease overall boater safety by reducing the number of boats tuned to channel 16.[12] Miller and Werner noted the importance of the channel 16 monitoring requirement in that pleasure craft often receive distress signals and then relay them to the Coast Guard.[13] Carey comments to the same effect, stating: "... the proposal to authorize... vessels to monitor channel 9... threatens to undermine the collective safety of boaters everywhere."[14]

9. The Coast Guard noted that it makes announcements of marine safety broadcasts on channel 16 nationwide but does not have the capability to make such broadcasts on channel 9 nationwide.[15] It agrees that while a second calling channel would reduce congestion on channel 16, thereby making it more likely that distress calls would be heard, it is concerned that permitting noncommercial

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[6] Section 80.5 of the Commission's Rules, 47 C.F.R. § 80.5, defines commercial vessels and noncommercial communications.

[7] *See* FCC Order, 5 FCC Rcd 5276 (1990).

[8] The Commission has been studying marine VHF radio usage in Boston Harbor since 1987. *See* FY-88 Boston Marine Safety Project Report (November 4, 1988) and FY-87 Regional Marine Safety Project Report (January 26, 1988).

[9] Report titled "Testing of VHF Maritime Channel 9 as a Secondary Calling Channel in Boston Harbor" conducted by the Field Operations Bureau, Boston Field Office, dated December 16, 1991.

[10] Coast Guard comments at 1.

[11] *See* Boston Study, attachment III.

[12] The safety system presently mandated by the Communications Act presumes that every ship is a potential lifeboat for ships in distress and requires certain ships to stand watch on a common distress frequency.

[13] Comments filed by Miller, at 1, and Werner, at 1.

[14] Comments filed by Carey, at 3.

[15] The announcements are usually made on the Coast Guard working channel, marine VHF channel 22, after a preliminary announcement is made on channel 16.

boaters to monitor channel 9 instead of channel 16 could cause some of those boaters to miss important marine safety broadcasts if the boaters were in an area where the Coast Guard did not have the capability to transmit on channel 9.

10. The Coast Guard suggests that Commission field offices and Coast Guard districts, with advice of the maritime community, might jointly designate areas of severe channel 16 congestion as appropriate regions for the use of a supplementary calling channel. The Army offers a similar proposal suggesting that use of channel 9 as a second calling channel be implemented regionally, only where congestion on channel 16 is most acute. The Army and the Coast Guard suggestions, if adopted, would mean that channel 9 could be made available only in a few designated geographic areas. The Army states, however, that congestion on channel 16 has caused a serious deterioration in its use as a safety and distress channel and supports efforts by the Commission to reduce such congestion.[16] The Army is concerned because it is responsible for operating swing bridges, locks, and other facilities on waterways in the United States and believes that "potential confusion [could exist] in communicating with Army facilities... if two frequencies are designated Nationally as calling frequencies by commercial and non-commercial vessels, respectively."[17] NMEA suggests that boaters can use scanning radios to monitor channel 16 for announcements of Coast Guard marine safety warnings broadcast on channel 22.[18]

11. *Decision.* While we appreciate the safety concerns expressed by the commenters in this proceeding that fewer recreational boaters will monitor channel 16, we are convinced by the results of the Boston study and the Coast Guard's comments that the use of a second calling channel significantly reduces congestion on channel 16. Reducing congestion on channel 16 has been a longstanding goal of the Commission and the Coast Guard because it increases the likelihood that a distress call will be heard and, thus, increases safety. Commenters Additionally, recreational boaters are not required to carry any radio equipment for safety purposes. Further, we note that boaters who voluntarily equip their boats with marine VHF equipment are required to monitor channel 16 but, often turn off their radios or fail to monitor that channel because of distracting or annoying congestion on it. When we proposed the use of marine VHF channel 9 as a second calling channel it was with the clearly stated intention that such use would be optional and would be for routine calling purposes. We noted specifically that channel 16 would continue to be used for distress and safety purposes. Finally, the Coast Guard's comments that a second calling channel will reduce congestion and make it more likely that distress calls will be heard, thus increasing safety, are particularly convincing because of its responsibilities to respond to distress calls. We believe that the benefits of reducing congestion on channel 16 far outweigh any disadvantage posed by commenters.

12. Accordingly, in view of the results of the Boston field office and Coast Guard study as well as the comments filed in this proceeding, we will permit the optional use of marine VHF channel 9 as a second calling channel nationwide and permit recreational boaters to monitor channel 9 in lieu of channel 16 for calling. We believe, however, that NMEA's suggestion regarding the availability of scanning radios for monitoring channel 16 is worth incorporating into a Public Notice concerning Maritime Communications to clarify the use of scanning radios. Additionally, as the Coast Guard suggests, Commission field offices will work closely with the Coast Guard District Commanders to publicize areas where channel 9 safety broadcasts will be made by the Coast Guard and encourage use of channel 9 for calling purposes in those areas.

Commercial/Noncommercial use of channel 9.

13. The *Notice* also proposed that the optional use of channel 9 as a second calling channel should be limited to private coast stations and noncommercial vessels, *e.g.*, recreational boats. Mobile Marine supports the designation of a second calling channel, stating that such a change would reduce congestion on channel 16. Mobile Marine, however, proposes that the use of channel 9 should be made available to commercial vessels and public coast stations as well as noncommercial vessels and private coast stations. Mobile Marine asserts that by not allowing public coast stations to call vessels on channel 9, vessels will have to 'break in' to channel 16 to communicate with the stations, thus creating additional interference to channel 16.[19] NMEA supports the use of channel 9 as a second calling channel for ship-to-ship or ship-to-private coast station, use only. NMEA suggests that the use of channel 9 be designated for voluntarily equipped vessels,[20] rather than for noncommercial vessels, noting that pleasure craft or yachts can be used for commercial purposes and that the distinction between commercial and noncommercial vessels is not always clear.

14. *Decision.* Mobile Marine's argument, that boaters will be required to 'break in' to channel 16 to listen for call-back messages from public coast stations, is unpersuasive. Boaters using public coast station service will simply use or monitor channel 16 or the public coast station's working channel, rather than channel 9, during the time that they expect a message from a public coast station. Further, while NMEA is correct regarding certain vessels having dual classifications, we believe NMEA's suggestion to permit any voluntarily equipped vessel to use channel 9 as an alternate calling channel would unnecessarily broaden the scope of the exception to the channel 16 watch. Permitting any voluntarily equipped vessel to use channel 9 would include many more vessels than

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[16] Army comments at 1.

[17] The Army apparently misread the *Notice* as proposing two calling channels, one for commercial vessels and one for noncommercial vessels. *See* 3. Further, any vessel wishing to contact an Army facility to arrange for bridge openings or lock operations must use the frequency assigned to the bridge or lock operator.

[18] NMEA states that there are 61 models of marine VHF radios available that offer scanning capability of two or more frequencies. NMEA suggested that the use of a scanning radio would permit boaters to use channel 9 for calling and retain monitoring capability on channel 16. Comments, filed by NMEA, at 2.

[19] Comments filed by Mobile Marine Radio, Inc., at 2.

[20] Voluntarily equipped vessels are all vessels not required by treaty or statute to be equipped with radio equipment, a category that may include commercial transport vessels. *See* Section 80.5 of the Commission's Rules, 47 C.F.R. § 80.5.

would be included under the proposed language. The focus of the *Notice* was to reduce congestion on channel 16 by providing a second, alternate channel for the increasing segment of recreational boaters, for routine calling purposes. Additionally, the Coast Guard supported this proposal, but only for noncommercial vessels.[21] Therefore, we are limiting the use of channel 9 as a second calling channel to noncommercial vessels.

15. Finally, we proposed in the *Notice* that we would permit the estimated 500 private coast stations currently licensed to operate on channel 9 to continue to do so. We proposed further that, should the stations affected wish to do so, they could apply to the FCC for an alternative frequency. We proposed that no fee would be charged for these license modifications. We received no comments on this issue and, therefore, adopt the provisions as proposed.

IV. FINAL REGULATORY ANALYSIS

16. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need and purpose of this action:

This Report and Order amends the rules to permit the optional use of marine VHF channel 9 as a second, alternate calling channel by noncommercial vessels in the maritime mobile service. This amendment is designed to promote the safety of life and property at sea.

II. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

III. Significant Alternatives considered:

The commenters to the *Notice of Proposed Rule Making* in this proceeding proposed subtle variations to the original proposal. The three main issues are whether the use of channel 9 as a second calling channel should be permitted nationwide; whether the use of channel 9 as a second calling channel should be limited to noncommercial vessels, *e.g.* recreational boats, for ship-to-ship and ship to private coast station, only; and whether relieving the requirement for noncommercial vessels to monitor channel 16 would jeopardize safety of life and property at sea. This Report and Order concludes that permitting the nationwide use of channel 9 will reduce congestion and, thus, improve the use of channel 16 for distress and safety communications. This action limits the use of channel 9 as a calling channel to noncommercial vessels only, as proposed. The results of the experimental use of channel 9 in the Boston Harbor area indicate substantially reduced congestion on channel 16 as reported by the Coast Guard and the Boston field office and substantially improved ability by the Coast Guard to receive distress calls.

V. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), Part 80 of the Commission's Rules, 47 C.F.R. Part 80, IS AMENDED as set forth below.

18. IT IS FURTHER ORDERED that this Report and Order will be effective thirty days after publication in the Federal Register.

19. For Further Information Contact: Susan Jones, Aviation and Marine Branch, Private Radio Bureau, (202) 632-7175.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

ATTACHMENT

FINAL RULE

Part 80 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 80 - Stations in the Maritime Services.

1. The authority section for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301, 609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

2. Section 80.310 is revised to read as follows:

§ 80.310 Watch required by voluntary vessels.

Voluntary vessels not equipped with DSC must maintain a watch on 156.800 MHz (channel 16) whenever the radio is operating and is not being used to communicate. Noncommercial vessels, such as recreational boats, may alternatively maintain a watch on 156.450 MHz (channel 9) for call and reply purposes.

3. Section 80.369 is amended by adding a new paragraph (e)(4) to read as follows:

§ 80.369 Distress, urgency, safety call and reply frequencies.

* * * * *

(e) * * *

(4) The frequency 156.450 MHz (channel 9) is available for intership, ship and coast station general purpose calling by noncommercial vessels, such as recreational boats. Distress, urgency and safety calls should initially be made on 156.800 MHz (channel 16) or, if equipped with DSC, on 156.525 MHz (channel 70).

[21] Coast Guard comments at 1.

4. Section 80.373(f) is amended by adding new footnote 15 to the noncommercial table to read as follows:

§ 80.373 Private communications frequencies.

* * * * *

(f) * * *

Frequencies in the 156-162 MHz band

Channel designator	Carrier Frequency (MHz)		Points of communication (Intership and between coast and ship unless otherwise indicated)
	Ship transmit	Coast transmit	
* * * * *			
Noncommercial			
* * * * *			
09[15]	156.450	156.450	
* * * * *			

[15] The frequency 156.450 MHz is available for intership, ship and coast general purpose calling by noncommercial vessels, such as recreational boats and private coast stations.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
April 20, 1992

Released: April 27, 1992

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

The Hearst Corporation 8210-BH
Licensee, Station WIYY C2-839(90)
3800 Hooper Avenue
Baltimore, MD 21211

Dear Sir or Madam:

This letter constitutes a Notice of Apparent Liability for a forfeiture in the amount of two thousand, five hundred dollars ($2,500) pursuant to Section 503(b) of the Communications Act of 1934, as amended, for willful and repeated violation of the anti-lottery broadcast provisions of the United States Code, 18 U.S.C. Section 1304, and the Commission's Rules. This action is being taken by the Chief of the Mass Media Bureau pursuant to the delegation of authority in Section 0.283 of the Commission's Rules.

After your counsel wrote to the Commission, acknowledging that WIYY had "inadvertently" run twelve commercial spots promoting a lottery between January 22 and 28, 1990, a complaint was filed alleging the same violation. As detailed in the complainant's letter, the lottery took place in conjunction with a superbowl party held at "Ball's the All American Bar" in Baltimore, MD. Patrons paid a $20.00 admission charge which entitled them to food, beverage, entertainment and a ticket for a random drawing to win a mountain trail bike and a weekend get-away at Days Inn.

Following receipt of the complaint, the Commission sent you a letter of inquiry that related the above-mentioned details of the alleged lottery. Your counsel telephoned the Commission and asked whether a written response was necessary, since he had previously informed the Commission about the matter and did not challenge the allegations. A member of our staff told your counsel that, under the circumstances, a written response was not necessary.

It thus appears that all three elements of a lottery - prize, chance and consideration - were present in this lottery promotion. In view of the foregoing, it appears that Station WIYY willfully and repeatedly violated 18 U.S.C. Section 1304 and 47 C.F.R. Section 73.1211 from January 22, 1990, through January 28, 1990. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, The Hearst Corporation is hereby advised of its apparent liability for a forfeiture of two thousand, five hundred dollars ($2,500).

The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act and the guidelines described in our recently adopted *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*. Under these standards, $6,250 is the base forfeiture for a lottery violation. While the violation was repeated, it occurred over a relatively short period of time and was voluntarily disclosed to the Commission. In view of these considerations, we believe a forfeiture of $2,500 is appropriate.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter to "show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart,
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of Mr. Gerald A. Kawalec,
Fulton, Texas,
for a Forfeiture

ORDER

Adopted: March 20, 1992; Released: April 28, 1992

By the Commission:

I. INTRODUCTION

1. Before the Commission is a letter dated September 28, 1990, from Mr. Gerald A. Kawalec, Fulton, Texas, requesting that a $750 monetary forfeiture penalty that had been imposed on him "be subject to further review by the full Commission . . . ." This letter is accepted as an Application for Review under Section 1.115 of the Commission's rules. 47 CFR Section 1.115.

II. BACKGROUND

2. Mr. Kawalec holds a ship station license that authorizes radio transmissions on ship frequencies. On October 19, and November 7, 9 and 13, 1989, he transmitted from a boat on 16,198 kHz. Mr. Kawalec is not licensed to use this frequency. This frequency is assigned by the FCC's rules to the fixed aviation and international fixed public radio communications services. 47 CFR Section 2.106. On January 17, 1990, the Federal Communications Commission's (FCC) Allegan, Michigan Office issued Mr. Kawalec a Notice of Forfeiture for a $750 monetary forfeiture penalty for violating Section 301 of the Communications Act of 1934. 47 USC Section 301. Section 301 prohibits the operation of an unlicensed radio station, which includes transmitting on frequencies where one is not licensed to operate.

3. In Mr. Kawalec's September 28 letter requesting review by the Commission, he also requested that he be contacted by telephone to discuss his appeal. On December 11, 1990, he was telephoned by an attorney in the FCC's Field Operations Bureau. During this conversation, Mr. Kawalec said that he would submit an additional statement in support of his appeal. This letter was submitted on January 30, 1991, and indicated, in part, that Mr. Kawalec could not afford to pay the monetary forfeiture penalty. The Field Operations Bureau responded by letter on February 18, 1991, and requested documentation to support the claim of inability to pay. This letter also stated "If you do not submit this evidence, the FCC will resume its review of your monetary forfeiture penalty assuming that you do not wish to maintain your claim of inability to pay." No documentation was provided.

III. DISCUSSION AND CONCLUSION

4. We have reviewed the entire record in this proceeding and we find no reason to disturb the results. Mr. Kawalec was not licensed to use a radio to transmit on 16,198 kHz. His operation on those frequencies was both willful, *see Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991), and repeated. The fact that his radio was capable of transmitting on unauthorized frequencies is irrelevant. A $750 monetary forfeiture penalty is not excessive for such a violation. In addition, Mr. Kawalec has provided no evidence that he is unable to pay this amount.

IV. ORDERING CLAUSES

5. IT IS ORDERED that pursuant to Section 155(c)(5) of the Communications Act of 1934 and Section 1.115(g) of the Commission's rules, the Application for Review filed by Mr. Gerald A. Kawalec is DENIED. 47 USC Section 155(c)(5), 47 CFR Section 1.115(g).

6. IT IS FURTHER ORDERED that Mr. Gerald A. Kawalec forfeit to the United States $750 for his violation of Section 301 of the Communications Act of 1934. Payment should be submitted within 30 days of the receipt of this letter, and may be by check or money order payable to the Federal Communications Commission. The number 3153361-90001 should be placed on the check and it should be sent to:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

Forfeitures not paid within 30 days may be recovered by the U.S. Attorney in a civil suit. 47 USC Section 504(a).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

LAS AMERICAS COMMUNICATIONS, INC. Newark, New Jersey	**MM DOCKET NO. 84-115** File No. BPH-821105AR
FRANCES LAWRENCE ANTONIN AND MARY GARCIA d/b/a ANTONIN AND GARCIA Jersey City, New Jersey	**MM DOCKET NO. 84-123** File No. BPH-821108AQ
CAPRICE BROADCASTING GROUP, INC. Newark, New Jersey	**MM DOCKET NO. 84-125** File No. BPH-821108AS
COMSERVE BROADCAST GROUP, INC. Newark, New Jersey	**MM DOCKET NO. 84-128** File No. BPH-821108AV
MULTICULTURAL BROADCASTING, INC. Newark, New Jersey	**MM DOCKET NO. 84-131** File No. BPH-821108BE
OMNILINGUAL BROADCASTING, INC. Newark, New Jersey	**MM DOCKET NO. 84-137** File No. BPH-821108BK

MEMORANDUM OPINION AND ORDER

Adopted: April 13, 1992; **Released: April 28, 1992**

By the Commission:

I. BACKGROUND

1. This proceeding, initiated in 1984, seeks to determine which applicant will receive a construction permit to replace Station WHBI(FM)'s deleted facilities on Channel 290 at Newark, New Jersey. The current interim operator, Global Broadcasting Group, Inc., provides multilingual programming but was explicitly precluded from applying for permanent authority to operate on FM Channel 290A. By Order of March 13, 1991, we set aside our approval of a settlement agreement among the parties hereto and our grant of Las Americas Communications, Inc.'s (Las Americas) amended application specifying Jersey City as its city of license. We also remanded the proceeding to the ALJ for the preparation of a Second Supplemental Decision based on issues concerning whether Las Americas (1) is financially qualified, (2) made material misrepresentations or lacked candor with respect to its financial qualifications, and (3) made material misrepresentations or lacked candor with respect to the existence and maintenance of its public file. *Las Americas Communications, Inc.*, 6 FCC Rcd 1507 (1991). Subsequently, the ALJ granted a "Joint Petition for Approval of Settlement Agreements and Grant of Multicultural Application." *Las Americas Communications, Inc.*, FCC 91M-2575, released August 19, 1991.

2. Before us now is an application for review filed September 18, 1991, by the Committee to Preserve Multi-Ethnic and Multi-Lingual Programming (the Committee to Preserve) urging that the ALJ's August 19 action be conditioned on retaining the current programming format. In addition, the Committee for Jersey City Radio filed a Petition for Leave to Intervene and an Opposition to the Administrative Law Judge's Order Approving the Joint Petition for Approval of Settlement Agreements and Grant of Multicultural's Application on September 24, 1991, urging denial of the grant to Multicultural unless the station is located in Jersey City.[1]

II. APPLICATION FOR REVIEW

3. In its application for review,[2] the Committee to Preserve, comprised of program producers and WHBI-FM listeners, explains that its sole purpose for filing is to request that "any approval of the Joint Petition be conditioned on the commitment of Multicultural . . . to retain the multi-ethnic and multi-lingual program format utilized by the interim operator of Channel 290A in Newark." We have previously dismissed an attempt by the Committee to Preserve to participate in this proceeding for lack of standing. *See Las Americas Communications, Inc.*, 6 FCC Rcd at 1507. The Committee to Preserve offers no new arguments to support its claim of standing except to assert that, although we there dismissed its petition for reconsideration for lack of standing, we considered its arguments on the merits and should do so here.

4. The basis for the Committee to Preserve's argument is that in reviewing its petition for reconsideration, we discussed our traditional policy that, apart from any obligation to respond to community needs in the area of information programming, licensees have broad discretion in the choice of an entertainment program format. However, the purpose of that discussion was to refute the Committee to Preserve's claim that it would be adversely affected by approval of the earlier settlement agreement, an element necessary to the sustaining of a petition for reconsideration. *See* 47 C.F.R. § 1.106. Because the interim operator was prohibited from applying for permanent authority to operate the station,[3] the ultimate licensee of the station will be under no obligation to continue the overall format or otherwise follow the particular programming practices of the interim operator, and therefore, we held that the Committee to Preserve had failed to show that it would be adversely affected by approval of that settlement agreement. 6 FCC Rcd at 1507 ¶ 6.

5. The Committee to Preserve now makes the same arguments again. Offering no new support for its claim of standing, the Committee to Preserve has shown no basis for participation in this proceeding. The Committee to Preserve also argues that jurisdiction over this matter remained with the Commission and that the ALJ did not have authority to do anything but issue a Supplemental Initial Decision. This argument is wrong. By regulation, 47 C.F.R. § 0.341, an ALJ has authority to act upon "all motions, petitions and other pleadings" until he has issued an initial decision. Nothing in our remand order limited or conditioned that authority other than to request expedi-

tion and specifiy that any exceptions would be filed directly with the Commission. Based on the foregoing, we will summarily dismiss the Committee to Preserve's application for review.

III. PETITION FOR LEAVE TO INTERVENE/OPPOSITION TO SETTLEMENT AGREEMENT

6. The Committee for Jersey City Radio, composed of residents of Jersey City, New Jersey, and listeners of WNWK (formerly WHBI(FM)), seeks to intervene in this proceeding for the purpose of opposing the ALJ's approval of the settlement agreement and grant of Multicultural's application. Before deciding whether the Committee for Jersey City Radio possesses the requisite standing to intervene in this proceeding, we will address the procedural adequacy of the pleading it seeks to have considered by us.

7. An "Opposition" to an ALJ's order approving a settlement agreement is not a pleading contemplated by the Commission's rules. Thus, the Committee for Jersey City Radio's pleading must be considered as an appeal of an ALJ's final ruling filed pursuant to 47 C.F.R. § 1.302. Section 1.302 requires that such appeals be filed within 30 days from the release of the subject order. The ALJ's order approving the settlement agreement was released on August 19, 1991; the Committee for Jersey City Radio's petition and opposition were not filed until September 24, 1991. Consequently, the Committee for Jersey City Radio's pleadings, which include no specific good cause for their untimeliness, were not timely filed and will be dismissed.

8. Even if the Committee for Jersey City Radio's pleadings had been timely filed, 47 C.F.R. § 1.223(c) requires petitions to intervene filed more than 30 days after publication of the hearing designation order to (1) set forth the interest of petitioner in the proceeding, (2) show how such petitioner's participation will assist the Commission in the determination of the issues in question and (3) set forth reasons why it was not possible to file a petition within the prescribed time.

9. The Committee for Jersey City Radio claims that its members are residents of Jersey City. It is clear from the supporting affidavits that the affiants' interests relate to the assignment of the station to Jersey City. Assuming, *arguendo*, that the Committee for Jersey City Radio satisfies the first prong of the Section 1.223(c) requirements, we are not convinced that it can meet either of the remaining two prongs. Multicultural's financial qualifications are questioned based on "new" information relating to tax liens or other Uniform Commercial Code filings against Sino Radio Broadcast Corp., Sino Communications Group Inc. or Greater Chinatown Publishing Inc. The Committee for Jersey City Radio asserts that these companies are either solely owned by Arthur Liu or jointly with his wife and that they are therefore relevent to this proceeding.[4] Multicultural responds that the tax deficiencies amount to only $7,000.00,[5] date back several years, do not involve Multicultural and, in any event, are unsupported by documentary evidence or affidavits of persons with actual knowledge.

10. The Committee for New Jersey Radio attempts to provide documentary evidence by filing a Reply enclosing a "certification" of its counsel that the tax judgments and U.C.C. financing statements were on record at the New York County Clerk's office or the City Register, New York County, as appropriate. However, the reply was filed on October 28, 1991, well beyond the time for a reply to the last opposition (filed by Multicultural on October 9, 1991). The Committee for New Jersey provided no justification or other explanation for its lateness. Accordingly, the Reply filed by the Committee for New Jersey Radio will be dismissed.

11. In any event, the Committee for Jersey City Radio merely speculates that this information, added to the additional financial burdens taken on by Multicultural in the settlement agreement, is sufficient to cast substantial doubt on Multicultural's ability to construct and operate the station for three months. The Committee for Jersey City Radio's submission of a few *de minimis* obligations of entities other than Multicultural, without any specifc allegations of fact supported by affidavits based on personal knowledge, falls far short of raising a substantial and material question of fact concerning Multicultural's ability to carry out its financial responsibilities in this proceeding or otherwise warranting further hearings to determine whether Multicultural is financially qualified. *See* 47 C.F.R. § 1.229. Thus, the Committee for Jersey City Radio has failed to substantiate the second prong required to demonstrate its standing to intervene in this proceeding.

12. As to the third prong, the Committee for Jersey City Radio argues that, until the ALJ's approval of the settlement agreement, its members had no idea that Multicultural would be the winning applicant or would not amend to specify Jersey City as the community of license. In this regard, the Committee for Jersey City Radio seeks to invoke the procedures of 47 C.F.R. § 73.3525(b) providing for a public notice which would in this case allow other interested persons to apply for a new station in Jersey City.

13. This proceeding began in 1984. Two possible communities of license were at issue throughout this proceeding. WNWK's community of license was Newark and the interim operation of WHBI has been a Newark station. The Committee for Jersey City Radio argues that the previous actions of the ALJ, Review Board and Commission suggested that Jersey City would be the community of license for the eventual winner in this proceeding. Thus, the Committee for Jersey City Radio argues that, until the ALJ approved the settlement agreement before us, there was no need to intervene. We disagree. Until final determination of a proceeding involving a 307(b) issue, no conclusion that a particular community is entitled to a license is warranted.

14. Accordingly, although the ALJ's Initial Decision awarded the grant to Antonin & Garcia based on a Section 307(b) preference for Jersey City, no assumption could be made that Jersey City would be the ultimate city of license. In fact, upon remand, the ALJ disqualified Antonin & Garcia and granted the application of Comserv Broadcast Group, Inc., proposing to serve Newark. *Supplemental Initial Decision*, 86D-11, released February 20, 1986, *affirmed in part*, 1 FCC Rcd 786 (Rev. Bd. 1986), *motion to enlarge denied*, 2 FCC Rcd 1614 (Rev. Bd. 1987). Thus, at least since February 1986, the Committee for Jersey City Radio was on notice that the award of the construction permit to an applicant proposing to serve Jersey City was not a forgone conclusion.

15. Therefore, the Committee for Jersey City Radio's claim that there was a reasonable expectation that Jersey City would be awarded the radio station until the ALJ granted Multicultural's application is without merit. That the Committee for Jersey City Radio may not have antici-

pated the specific outcome based on the settlement agreement before us does not provide grounds for its entry into the proceeding at this late date. As the Court of Appeals stated in upholding the Commission's rejection of a timely filed petition for reconsideration of a comparative license challenge: "If we were to require the Commission to accept surprise as a sufficient justification for a new party to seek reconsideration, the Commission's -- and indeed the public's -- interest in finality of licensing decisions would be eviscerated." *Committee for Community Access v. FCC*, 737 F.2d 74, 84 (D.C. Cir. 1984). We therefore find that the Committee for Jersey City Radio has not shown good cause for its failure to seek intervention in a timely fashion. *See Coalition for the Preservation of Hispanic Broadcasting v. FCC*, 931 F.2d 73 (1991).

16. Apart from the inadequacies of the Committee's pleadings, however, we recognize the important policies reflected in Section 307(b) of the Act, and we thus have considered independently the applicability of Section 73.3525(b) of our Rules. We have concluded, after examining all of the circumstances of this proceeding, that there are countervailing considerations present here which, in our view of the overall public interest, outweigh the interest in providing a further opportunity for applications that propose Jersey City as the community of license.

17. First, Section 73.3525(b) does not, by its terms, apply to this case in its present posture. This is because the Commission is not now faced with any *qualified* applicant for a community other than Newark. The only original applicant for Jersey City, Antonin and Garcia, was disqualified on character grounds. 6 FCC Rcd at 1510 ¶ 26. Another applicant, Las Americas, at one point amended its application to specify Jersey City as its city of license, but our order approving that amendment has been vacated. 6 FCC Rcd at 1511 ¶ 37. Thus, the present settlement comes at a time when there is no Section 307(b) choice to be made between Jersey City and Newark, and Section 73.3525(b)'s intended purpose -- to assure that a settlement will not prevent what could otherwise be the achievement of the goals of Section 307(b) -- is not implicated at this point in this proceeding.

18. Moreover, the Commission is presented here with an unusual situation for purposes of determining the most equitable and efficient distribution of frequencies under Section 307(b). These are all new applicants to operate on this frequency and, were this a proceeding for a license to operate a station in New Jersey for the first time on this frequency, a qualified applicant that proposed Jersey City as its community of license might be entitled to a decisive preference under Section 307(b) over competing applicants that proposed Newark as their community of license. *See, e.g., Beaufort County Broadcasting Company*, 94 FCC 2d 572 (Rev. Bd. 1983), *rev. denied* FCC 84-284, released June 19, 1984, *aff'd* 787 F.2d 645 (1986). However, a station on this frequency has been operating for over 25 years with Newark as the community of license. If we were to make a Section 307(b) comparison between Newark and Jersey City, we now believe that it would be appropriate to consider as one relevant factor the interest of Newark in *not* losing an established service. *See Television Corp. of Mich. Inc. v. FCC*, 294 F.2d 730, 732 (D.C. Cir. 1961). In light of this factor, we believe it would not "*unduly* impede achievement" of Section 307(b) objectives for the channel to remain in Newark. *See* 47 C.F.R. § 73.3525(b)(1) (emphasis added).

19. In addition, this proceeding has already proven to be lengthy and contentious. Were we to invoke Section 73.3525(b) and thereafter receive applications from hitherto dormant entities, the prospect would be for years of further litigation, during which service would continue to be provided by an interim licensee. We believe that entrusting the frequency to a qualified applicant operating pursuant to a regular license with all the obligations attendant thereto would better serve the public interest than an indefinite continuation of the present interim operation.

20. All of these considerations lead us to conclude that it is neither necessary nor appropriate to the public interest that we invoke the procedures of Section 73.3525(b) with respect to this settlement agreement.

IV. ORDERS

21. ACCORDINGLY, IT IS ORDERED That the Application for Review filed on September 18, 1991 by the Committee to Preserve Multi-Ethnic and Multi-Lingual Programming IS DISMISSED.

22. IT IS FURTHER ORDERED That the Petition of the Committee for Jersey City Radio for Leave to Intervene filed September 24, 1991 IS DENIED and the Opposition to the Administrative Law Judge's Order Approving the Joint Petition for Approval of Settlement Agreements and Grant of Multicultural's Application filed by the Committee for Jersey City Radio on September 24, 1991 IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] In addition, the following pleadings are before us: (1) an Opposition to Application for Review filed by Multicultural Broadcasting, Inc. (Multicultural), on October 2, 1991; (2) Mass Media Bureau's Opposition to Application for Review (MMB), filed on October 2, 1991; (3) MMB's Consolidated Opposition to Petition for Leave to Intervene and "Opposition" to Order Approving the Joint Petition for Approval of Settlement Agreements filed October 3, 1991; (4) Opposition to Committee for Jersey City Radio Petition for Leave to Intervene filed by Multicultural on October 9, 1991; (5) Reply filed October 17, 1991 by the Committee to Preserve; and (6) Reply to Mass Media Bureau's and Multicultural's Oppositions filed by Committee for Jersey City Radio on October 28, 1991.

[2] Although labeled an Application for Review, the Committee to Preserve's pleading is effectively an appeal of the ALJ's order under 47 C.F.R. § 1.302.

[3] This restriction was imposed on the interim operator, selected in 1983, so that an applicant for permanent licensing could not derive an advantage over its competitors in the hearing to select a regular licensee. *See Beloit Broadcasting, Inc. v. FCC*, 365 F.2d 962 (D.C. Cir. 1966); *Community Broadcasting Co. v. FCC*, 274 F.2d 753 (D.C. Cir. 1960); and *Las Americas Communications, Inc.*, 5 FCC Rcd 1634, 1635 ¶ 8 and 1639 n.9 (1990).

[4] Mr. Liu is the sole shareholder in Multicultural.

[5] Our computation of the tax judgments alleged by the Committee for New Jersey Radio to be outstanding shows a total of $7,839.85.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-352

In re Applications of

Ronald E. Patterson & Cal E. Varner d/b/a CAPITOL CITY BROADCASTING COMPANY	File No. BPH-880812MZ
INGRAM & SCOTT COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-880816NZ
MATTHEW WILLIAMS	File No. BPH-880816OC

For Construction Permit for a New FM Station on Channel 247C2 in Longview, Texas

ORDER

Adopted: April 13, 1992; Released: April 28, 1992

By the Commission:

1. In a *Memorandum Opinion and Order*, FCC 91M-2061, released July 5, 1991, Administrative Law Judge Edward J. Kuhlmann (ALJ) dismissed the application of Ingram & Scott Communications Limited Partnership (I&S) for its failure to timely amend to demonstrate its financial qualifications. The Review Board affirmed I&S's dismissal. *Capitol City Broadcasting Company*, 6 FCC Rcd 5525 (1991). We agree with the Board's disposition of this matter and affirm its decision.[1]

2. Initially, we note that I&S did not file its appeal of the ALJ's ruling with the Review Board in a timely manner. 6 FCC Rcd at 5527 n.1. Given this circumstance and the attendant lack of good cause, it is clear that there would be a sound reason for denial of I&S's application for review without further consideration. *Id.* In this regard, while we believe that the Board followed the preferable practice in addressing the merits of I&S's appeal in its order, we wish to make clear that we will not hesitate to summarily dispose of such procedurally deficient matters where circumstances warrant such action in the future. Nonetheless, we believe that it is appropriate to comment on several matters raised in I&S's application for review.

3. As part of its good cause showing in seeking to amend to re-establish its financial qualifications on April 17, 1991, I&S submitted a copy of a letter from its counsel to an official of the First National Bank in Marshall, Texas, wherein counsel asked about possible financing for I&S's proposal. Exh. 8 to Supplement to Petition to Amend filed April 30, 1991. Because counsel's letter is dated November 26, 1990, and refers to an earlier conversation between that official and Kent Foster (an I&S limited partner), I&S contends that it did demonstrate that it had taken immediate steps to obtain new financing once it learned in early September 1990 that it could no longer rely on the National Bank of Washington for reasonable assurance of financing, and that both the ALJ and the Board erred in holding otherwise. We disagree. In order to comply with the good cause requirement for an amendment pursuant to 47 C.F.R. § 73.3522(b)(1), an applicant must show, inter alia, that it acted with due diligence. That is, the applicant must establish that it proceeded promptly and it must provide an acceptable explanation of the steps taken to effectuate the amendment. *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143-144 (Rev. Bd. 1970); *cf. California Broadcasting Corporation*, 90 FCC 2d 800, 809 ¶ 19 (1982) (ordinarily waiting six months to file an amendment is not acting with due diligence).

4. As counsel's letter does not state the date that the asserted conversation occurred, it is wholly inadequate to support I&S's contention. Moreover, even if the date had been stated, the letter nonetheless would be of no probative value in the absence of corroborating statements, which I&S did not submit, from the two named individuals confirming such a conversation.[2] Furthermore, based on our review, we note that I&S likewise did not submit corroborating statements from other banks listed in Foster's declaration that were purportedly contacted concerning I&S's need for new financing and upon which I&S principally relied to demonstrate that it acted diligently. Exh. 5 to Supplement to Petition to Amend filed April 30, 1991. Accordingly, for this additional reason, we find that I&S did not meet its burden of showing good cause for amending its application under the applicable due diligence test established in *Erwin O'Conner*, *supra*. *See* also *Sharon Anette Haley*, 6 FCC Rcd 1567 (Rev. Bd.), rev. den. 6 FCC Rcd 4630 (1991) (where dismissed applicant has failed to demonstrate that it had taken any serious steps to obtain needed financing).

5. I&S also contends that Commission policy favors the acceptance of amendments curing disqualifying defects in applicants' proposals, and that its financial amendment therefore should have been accepted. The Commission, however, no longer follows such a policy, because it has determined that its former liberal amendment policy of temporizing with flawed proposals had disserved the public interest by inordinately delaying new service to the public and that it was inconsistent with the more recent goal of expeditiously providing new service to the public. *See Aspen FM, Inc.*, 6 FCC Rcd 1602, 1603-04 ¶¶ 12, 13 and n.5 (1991); and *Chudy Broadcasting Corp.*, 58 RR 2d 133, 134 n.7 (1985). Accordingly, as more fully explained in *Aspen*, the Commission's former amendment policy has been overturned and *Gilbert Broadcasting Corp.*, 55 RR 2d 429 (1982) and similar cases adhering to that policy, which I&S cites, are no longer good law. *California Broadcasting Corp.*, 90 FCC 2d 800 (1982), *Circle L. Inc.*, 101 FCC Rcd 617 (Rev. Bd. 1985), and *Elijah Broadcasting Corp.*, 3 FCC Rcd 5148 (Rev. Bd. 1988), upon which I&S relies to contend that other applicants have been allowed to amend to cure disqualifying defects in their proposals within the time it took to find new financing are distinguishable.[3] In those cases, the applicants demonstrated that they had diligently pursued new transmitter sites, whereas I&S has failed to meet its burden of demonstrating in this proceeding that it did likewise in pursuing new financing.

6. I&S also contends that the Board erred in relying upon a finding in *Texas Communications Limited Partnership*, 6 FCC Rcd 5191 (1991), *recon. pending*, in holding that the acceptance of a financial amendment would require the addition of issues against I&S in this case. We disagree. In its decision, 6 FCC Rcd 5526-27, ¶ 10, the Board noted that the facts in this case are similar to those in *Texas Communications*, because the applicant there, like I&S here, had initially relied on financing from the East Texas State Bank (ETSB) when it filed its application and did not report to the Commission the loss of that financing when ETSB became insolvent. The Board further noted that the Commission had held in *Texas Communications* that the applicant's failure to report its loss of financing would have required additional issues to be specified in that proceeding had the applicant's new financial proposal been accepted. Relying on the Commission's holding there, the Board concluded that the same would be true in this case, as the undisputed facts showed that I&S did not report the loss of its original financing. We fully agree with that determination and find that the Board did nothing improper in reaching such a conclusion, despite I&S's contentions to the contrary.

7. ACCORDINGLY, IT IS ORDERED pursuant to 47 C.F.R. § 1.115(g) that the Application for Review filed October 28, 1991, by Ingram & Scott Communications Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Before us are an Application for Review filed October 28, 1991, by I&S and an Opposition thereto filed November 12, 1991, by Capitol City Broadcasting Company.

[2] We note that the ALJ specifically informed I&S that it would have to substantiate and corroborate any due diligence claims upon which it planned to rely in asking to amend and accorded I&S an opportunity to do so after it filed on April 17, 1991, its petition to amend and amendment. *See* Memorandum *Opinion and Order*, FCC 91M-1312, released April 19, 1991, at ¶ 5.

[3] We find no merit to I&S's contention that both the ALJ and the Board erred in rejecting its financial amendment because they failed to consider the banking crisis then prevailing when I&S was attempting to obtain new financing. Here again, the deficiency was in I&S's failure to provide statements from the banks showing that it proceeded with due diligence, which is a matter wholly separate from any asserted crisis in the banking industry.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-84

In re Applications of	
GRADY LYNN and CAROL LYNN d/b/a LYNN BROADCASTING	File No. BPH-891011MJ
EDITH M. GELFAND	File No. BPH-891012MN
JAMAL BROADCASTING, L.P.	File No. BPH-891012MS
Q. PRIME, INC.	File No. BPH-891012MT
MT. JULIET BROADCASTING, INC.	File No. BPH-891012MV
LORI N. WALKER	File No. BPH-891012NH
For Construction Permit for a New FM Station on Channel 294A in Mt. Juliet, Tennessee	

MEMORANDUM OPINION AND ORDER

Adopted: April 16, 1992; Released: April 28, 1992

By the Commission:

1. The above captioned applicants seek a construction permit for a new FM station on Channel 294A in Mt. Juliet, Tennessee. In a letter, dated July 31, 1991, the applicants notified Administrative Law Judge Edward J. Kuhlmann that they had reached a verbal settlement whereby Q Prime would pay the other applicants to dismiss their respective applications. Counsel for some of the applicants signed the letter, but it was not signed by any principal. Although the letter stated how much Q Prime proposed to pay each dismissing applicant, it was not accompanied by affidavits from each party to the agreement explaining how approval of the agreement would serve the public interest and certifying that the applications were not filed for the purpose of reaching such a settlement agreement, as required by 47 C.F.R. § 73.3525 of the Rules and 47 U.S.C. § 311(c) of the Act. In accordance with their July 31, 1991 promise to file the agreements "as soon as they are executed," the parties filed a Joint Motion for Approval of Settlement Agreement on August 6, 1991.[1]

2. By Memorandum Opinion and Order, FCC 91M-2826 (released Sept. 12, 1991), Judge Kuhlmann denied the parties' August 6, 1991 Joint Motion for Approval of Settlement Agreements. The ALJ relied on *Amendment of Section 73.3525 of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits*, 6 FCC Rcd 85 (1990), modified, 6 FCC Rcd 2901 (1991). There, the Commission modified section 73.3525, which governs settlement agreements among competing applicants, to provide that payments may not exceed the applicants' legitimate and prudent expenses incurred in prosecuting their applications. It announced that "as of the effective date of the new rules, August 1, 1991, the settlement payment limitations will apply to all applications, including those that are pending at that point." 6 FCC Rcd at 2902 ¶ 8.

3. The applicants did not represent in the August 6, 1991 Joint Motion that the proposed settlement payments, which ranged from $125,000 to $50,000, were limited to the applicants' out-of-pocket expenses in prosecuting their applications. Characterizing the July 31, 1991 letter as "no[thing] more than an expression of intent to file a petition that met [section 73.3525's] requirements," the ALJ held that the August 6, 1991 agreement was filed too late to take advantage of the rule, in effect on July 31, 1991, that would have permitted unlimited settlement payments. The ALJ denied the Joint Motion, holding that, in the absence of a showing that the payments are limited to the dismissing applicants' legitimate and prudent expenses, the August 6, 1991 filing did not comply with the new settlement limitations that became effective on August 1, 1991. *Memorandum Opinion and Order*, FCC 91M-2826 ¶ 4.

4. Pursuant to 47 C.F.R. § 1.301(b), Q Prime sought permission to appeal the ALJ's interlocutory ruling denying the Joint Motion to Approve Settlement Agreements. Citing the Commission's refusal to accept a for-profit settlement filed on August 1, 1991 (that is, on the effective date of the new settlement limitations) in *SBM Communications, Inc.*, 6 FCC Rcd 5522 (1991), the ALJ found that Q Prime had not shown that a new or novel question of law or policy is presented or that the ALJ's rejection of the settlement agreement would require a remand. Accordingly, the ALJ refused to grant Q Prime permission to appeal the denial of the August 6, 1991 Joint Motion. *Memorandum Opinion and Order*, FCC 91M-3255 (released Nov. 12, 1991).

5. Notwithstanding the ALJ's November 12, 1991 ruling, Q Prime filed a Petition for Extraordinary Relief on December 19, 1991 seeking prompt Commission determination as to whether section 73.3525 of the rules, as recently amended, applies to a universal settlement agreement entered into before the effective date of the amended rule. In an Opposition, filed on January 3, 1992, the Mass Media Bureau urges that the ALJ properly rejected the settlement agreement and that Q Prime's unauthorized Petition for Extraordinary Relief should be summarily dismissed. The Bureau argues that, in determining compliance with section 73.3525, the critical event was not the date on which the applicants entered into an agreement, but rather the date on which they filed the Joint Motion. On April 13, 1992, Q Prime filed a Request for Immediate Action urging the Commission to dispose of its Petition for Extraordinary Relief by April 30, 1992. In view of our action herein, Q Prime's Request for Immediate Action is moot and will be dismissed.

6. *Discussion*: We agree with the ALJ that this case presents no novel question of law or policy warranting Commission consideration under section 1.301(b).[2] Al-

though Q Prime concedes that the settlement agreement is deficient under the settlement limitations that took effect on August 1, 1991, it argues that the August 6, 1991 Joint Motion should have been granted pursuant to the rule in effect on July 31, 1991, the date on which the parties notified the ALJ that a verbal agreement had been reached. Thus, it attempts to distinguish *SBM Communications*, 6 FCC Rcd 5522 (1991), where the Commission refused to waive the settlement limitations and accept a for-profit settlement filed on August 1, 1991, on the ground that Q Prime -- unlike the *SBM* applicants -- does not seek a waiver of those limitations.

7. However, as the ALJ found, the July 31, 1991 letter did not provide a basis for approving the agreement under the requirements of section 73.3525 in effect on that date. By merely sending a letter to the ALJ, the applicants had not complied with the requirement under both versions of section 73.3525 that, within five days of reaching an agreement, the parties must submit a copy of the agreement, as well as an affidavit from each party to the agreement explaining how approval of the agreement would serve the public interest and certifying that their applications were not filed for the improper purpose of entering into a settlement agreement.[3] In our view, the critical event for determining compliance with section 73.3525 of the rules is the filing of the settlement agreement (and the supporting documentation), rather than the date on which the parties either reached a settlement agreement or notified the ALJ of the settlement. *See Gifford Orion Broadcasting, Ltd.*, 6 FCC Rcd 6494, 6494-95 ¶ 6 (Rev. Bd. 1991), in which the Board reversed an ALJ's approval of a for-profit settlement filed on August 1, 1991 where the ALJ had relied on the fact that the settlement was filed within 5 days of its execution on July 31, 1991.

8. ACCORDINGLY, IT IS ORDERED, That the Petition for Extraordinary Relief, filed December 19, 1991, by Q Prime, Inc. IS DISMISSED; and that the Request for Immediate Action, filed April 13, 1992 by Q Prime IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] New Era Communications Group, Inc. and Rita Broadcasting Company, Inc. were also parties to the settlement agreement. Both applications were subsequently dismissed. *Memorandum Opinion and Order*, FCC 91M-2662 (released August 29, 1991) [New Era]; *Memorandum Opinion and Order*, FCC 91M-3255 ¶ 6 (released November 12, 1991) [Rita].

[2] We are not persuaded to permit Q Prime's appeal at this time simply due to the fact that the settlement agreement may become moot because any party may withdraw from the settlement if it has not been approved by the Commission within nine months from July 31, 1991. That circumstance does not affect our determination that this case does not raise a novel question of law or fact warranting our immediate consideration.

[3] Indeed, it is clear that the applicants had not reached an agreement, but were still engaged in negotiations, on July 31, 1991 (that is, on the last date for filing an unlimited settlement). Hence, the July 31 letter reported how much Q Prime had agreed to pay the other applicants, but stated that the amount listed for one of the applicants was only tentative inasmuch as its counsel was unavailable and had not finally agreed to that amount. In fact, the August 6, 1991 Joint Motion reflected that Q Prime would pay that applicant $70,000 instead of the $50,000 reported in the July 31, 1991 letter. Another applicant listed in the July 31 letter as having agreed to a "settlement" did not follow through on the agreement. In other words, the parties were still negotiating their agreement on July 31, 1991, and did not have an agreement until after the effective date of the new settlement payment limitations.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-510

In re Applications of

RAMON RODRIGUEZ AND ASSOCIATES, INC. — File No. BPH-821208AA

DAVID ORTIZ RADIO CORPORATION — File No. BPH-830722AL

For a construction permit for a new FM Station at Lajas, Puerto Rico

MEMORANDUM OPINION AND ORDER

Adopted: April 16, 1992; Released: April 29, 1992

By the Commission:

1. In *Ramon Rodriguez and Associates, Inc.*, 5 FCC Rcd 4041 (1990), the Commission denied an application for review filed by David Ortiz Radio Corporation (Ortiz) and affirmed the grant of Ramon Rodriguez and Associates, Inc.'s (Rodriguez) application. The Court of Appeals remanded this proceeding for further consideration of Rodriguez's qualifications to be a licensee. *David Ortiz Radio Corporation v. FCC*, Case No. 90-1412 (D.C. Cir. August 20, 1991). The Office of General Counsel requested the parties to comment on what further action would be appropriate in light of the remand. *Ramon Rodriguez and Associates, Inc.*, FCC 91I-066 (OGC September 30, 1991). Now before the Commission are Comments filed October 24, 1991 by Rodriguez and by Ortiz and Reply Comments filed November 4, 1991 by Rodriguez and by Ortiz. After careful review of these matters and other portions of the record, we conclude that this proceeding should be remanded to the ALJ for further hearings.

2. The court found that material questions were raised concerning whether Rodriguez concealed the loss of its antenna site from the Commission, and whether a principal of Rodriguez abused the Commission's processes by posing as a Commission employee. Rodriguez argues that the Commission can resolve the issues raised by the court on the basis of the present record and reaffirm the grant of its application. Rodriguez additionally argues that, if this matter is remanded for further hearings, evidentiary hearings should also be ordered with respect to Ortiz's application.[1] Ortiz argues that the record fully supports the court's finding that serious hearing questions are raised with respect to Rodriguez's qualifications.[2]

3. *Rodriguez's antenna site*: On January 10, 1983, Rodriguez was notified by Conservation Trust of Puerto Rico that its proposed site was to become a bird sanctuary and that Rodriguez would be denied "the use of the property" as a transmitter site. Slip Opinion at 10. Under 47 C.F.R. § 1.65, which requires an applicant to amend its application whenever the information in it is no longer substantially accurate and complete, this circumstance should have been brought to the Commission's attention within 30 days. Rodriguez did not do this. Rather, on March 18, 1983, Rodriguez filed an amendment listing a new community of license but specifying its original transmitter site. Then on July 7, 1983, it withdrew the March 18 amendment and reinstated its original proposal including its original transmitter site. Rodriguez did not file an amendment specifying its present site until August 26, 1983. The court, in remanding this proceeding, said that the March 18 amendment and the letter withdrawing that amendment continued to list the original site even though Rodriguez knew that the site was no longer available. Thus, the court concluded that these documents "offer plausible evidence that the applicant may have willfully withheld information from the Commission, thereby raising serious question as to 'its basic qualifications to be a licensee.'" Slip Opinion at 13.

4. Rodriguez argues that it was represented *pro se* and that it was confused about the ownership and availability of the proposed antenna site. Rodriguez contends that it received conflicting reports concerning the ownership of the site and that, because Ortiz had specified the same site, it did not realize that it was required to advise the Commission about the loss of the site. It further argues that the March 18 amendment merely specified a new city of license and it did not realize that the March 18 amendment and the subsequent withdrawal of that amendment included certifications of its proposed site. Finally, Rodriguez asserts that there is no evidence that it intentionally concealed the loss of its site from the Commission and that its failure to advise the Commission of the loss of its transmitter site is not disqualifying. It concludes that the record supports its version of the facts and that the Commission can resolve the antenna site issue on the basis of the current record without further hearings.

5. We recognize that an unintentional failure to disclose the loss of the site would not be disqualifying. The bare existence of a mistake without a showing of deceptive intent does not constitute disqualifying conduct. *MCI Telecommunications Corp.*, 3 FCC Rcd 509, 512 ¶ 35 (1988). The record, however, indicates that Rodriguez was aware of the loss of its transmitter site when it later certified that the site was available for its transmitter. In a Motion for Partial Summary Decision, filed June 15, 1988, Exh.B, p. 2., a Rodriguez principal affirmed that he was told by the Conservation Trust on January 10, 1983 that the proposed use of the site for a bird sanctuary was incompatible with Rodriguez's intent to use the site for its transmitter, and that Rodriguez then initiated steps to locate a new transmitter site. Thus, the court found that the certification of Rodriguez's original antenna site in the March 18, 1983 amendment and in the July 7, 1983 withdrawal of that amendment and reinstatement of its original proposal is "suitable evidence of an intent to conceal pertinent information from the Commission." Slip Opinion at 12-13. In accordance with the court's decision, we conclude that there is a substantial and material question of fact warranting further hearings concerning Rodriguez's basic qualifications in light of the allegations that it intentionally concealed the loss of its transmitter site from the Commission.

6. *Impersonation of an FCC Employee*: Ortiz alleges that Juan Carlos Rodriguez Maldonado, the son of Rodriguez's 50% owner and a minority shareholder, posed as an FCC employee in seeking evidence. Ortiz submitted a declaration, under penalty of perjury, from a third party witness that Rodriguez Maldonado identified himself as an FCC employee. Rodriguez argues that the allegations are rebutted by affidavits from Rodriguez Maldonado and another person who accompanied Rodriguez Maldonado, and that the allegations are insubstantial and do not warrant further hearings. As the court noted, the direct conflicts in the submitted statements can best be resolved by examination of the affiants in the hearing process. Slip Opinion at 15-16. The affidavits raise a question as to whether Rodriguez Maldonado engaged in "such misconduct as...harassment of opposing parties, which threatens the integrity of the Commission's licensing processes" by representing himself as a Commission employee. Slip Opinion at 14, citing *Character Qualifications*, 102 FCC 2d 1179, 1205, 1211 (1986). Rodriguez has presented no facts or arguments that were not considered by the court. We agree with the court that a substantial and material question of fact warranting further hearings concerning Rodriguez's basic qualifications has been raised.

7. *Ownership of WIMO (FM)*: WMIO(FM), Cabo Rojo, Puerto Rico, is owned by Maria I. Ortiz-Aviles, David Ortiz's daughter. Rodriguez contends that David Ortiz is the real party-in-interest in WMIO(FM). In this regard, Rodriguez alleges that the studio for WMIO(FM) is located in the same building as the studio for WEKO(AM), which is owned by Ortiz, that the electric utility account for WMIO(FM) is in the name of David Ortiz, and that David Ortiz helped secure a land use permit to build a shed for WMIO(FM). Ortiz explained that David Ortiz signed for the electric account to assist his daughter so that she could avoid paying a $4,000 deposit required for first time users but that she is responsible for paying the electric bills. It further claims that he helped his daughter get a building permit because she was pregnant and involved with other duties at the station. In light of Ortiz's explanations, the allegations listed above fall short, in and of themselves, of raising a substantial and material question of fact concerning David Ortiz's role in the operation of WMIO(FM), and we agree with the ALJ that they do not warrant designation of the issues mentioned in note 1, above. FCC 88M-2185 *supra*; Ortiz Opposition to Further Motion to Enlarge Issues filed June 15, 1988, Exhs. 1 and 2.

8. Rodriguez also alleges, inter alia, that David Ortiz maintains control over the WMIO(FM) public information file and that he hired an employee for WMIO(FM). In support of these allegations, Rodriguez submitted declarations from Juan Carlos Rodriguez Maldonado, a principal of Rodriguez, and Juan N. Esquerdo, a third party who accompanied Rodriguez Maldonado to WMIO(FM), based on their conversations with WEKO and WMIO(FM) employees. Ortiz provided sworn statements from those employees denying Rodriguez's allegations. Ortiz Opposition to Motion to Enlarge Issues filed April 6, 1988. The ALJ properly rejected Rodriguez's declarations because they were based on hearsay. FCC 88M-1753 *supra* at ¶ 4.

9. However, subsequently in a Supplement filed May 2, 1988 Rodriguez submitted an affidavit from Jorge Morales Gonzague, a third party, alleging that David Ortiz offered him the position of Director of Programming at WMIO(FM). This allegation was denied by David Ortiz in a sworn statement attached to an Opposition filed May 17, 1988 by Ortiz. The ALJ acknowledged the contradictions in these statements, but rejected Morales Gonzague's statement because of the lack of corroboration. FCC 88M-1753 *supra* at ¶ 8. The direct contradictions in the above statements cannot be adequately resolved on the basis of the present record. Thus, we believe that, just as for Rodriguez, a substantial and material question of fact warranting further hearings concerning Ortiz's qualifications has been raised.[3] In light of the court's order, the conflicting nature of these statements should be resolved in a hearing.[4]

10. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 U.S.C. § 309(e) this proceeding IS REMANDED to Administrative Law Judge John M. Frysiak, for expedited hearings and preparation of a Supplemental Initial Decision on the following issues:[5]

1. To determine whether Ramon Rodriguez and Associates, Inc. made material misrepresentations in certifying to the Commission that it had reasonable assurance of the availability of its specified antenna site in its March 18, 1983 amendment and its July 7, 1983 reinstatement of its original proposal.

2. To determine whether Juan Carlos Rodriguez Maldonado abused the Commission's processes by impersonating an FCC employee and whether Ramon Rodriguez and Associates, Inc. submitted false sworn statements with respect to this matter.

3. To determine whether David Ortiz offered Jorge Morales Gonzague a position of employment at station WMIO(FM), Cabo Rojo, Puerto Rico, and whether Ortiz Radio Corporation submitted a false sworn statement with respect to this matter.

4. To determine, from the evidence adduced pursuant to Issues 1 and 2, above, whether Ramon Rodriguez and Associates, Inc., possesses the basic qualifications to be the licensee of the facilities sought herein.

5. To determine, from the evidence adduced pursuant to Issue 3 above, whether David Ortiz Radio Corporation possesses the basic qualifications to be the licensee of the facilities sought herein.

11. IT IS FURTHER ORDERED, That the burden of going forward with the evidence under Issues 1 and 2 SHALL BE UPON David Ortiz Radio Corporation, that the burden of going forward with evidence under Issue 3 SHALL BE UPON Ramon Rodriguez and Associates, Inc., that the burden of proof under Issue 4 SHALL BE UPON Ramon Rodriguez and Associates, Inc., and that the burden of proof under Issue 5 SHALL BE UPON David Ortiz Radio Corporation. *Elyria-Lorain Broadcasting Co.*, 6 RR 2d 191, 198 ¶ 17 (1965).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Rodriguez filed petitions requesting the ALJ to specify issues concerning whether Ortiz's principal is also the real party in-interest in station WMIO(FM), Cabo Rojo, Puerto Rico; whether Ortiz concealed his interest in WMIO(FM) from the Commission, and whether if Ortiz's application is granted, his interest in WMIO(FM) would result in a signal overlap prohibited by 47 C.F.R. § 73.3555. These petitions were denied by the ALJ. *Ramon Rodriguez and Associates*, FCC 88M-1753 (ALJ June 8, 1988); FCC 88M-2185 (ALJ July 12, 1988); and FCC 88M-3518 (ALJ Oct. 21, 1988). Given its grant of Rodriguez's application, the Board did not reach Rodriguez's exceptions to the ALJ's rulings. In light of the court's ruling on the Board's decision, these matters are again ripe for consideration.

[2] In this regard, Ortiz also asserts that Rodriguez should be summarily disqualified, but, as reflected below, we believe that the public interest will be best served by a full evidentiary hearing under the circumstances presented here.

[3] This is not to suggest that the mere filing of two sworn statements by opposing parties invariably requires the specification of hearing issues. As the Court of Appeals has previously indicated, "the Commission may, and indeed must, weigh against the allegations of the petition the other evidence before it, including opposing affidavits filed pursuant to § 309(d)(1). On the basis of *all* those materials it must decide whether the ultimate question of fact placed in issue . . . is a 'substantial' one - *i.e.*, whether the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for." *Citizens for Jazz on WRVR, Inc.* v. *FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985).

[4] Rodriguez also requested a site availability issue against Ortiz. However, as noted by the ALJ, the agreement signed by the site owner does not contain any restriction concerning the exclusive use of the site by WMIO(FM) or any provision that would prohibit a sublease of space to Ortiz. FCC 88M-3518 *supra* at ¶ 5. Accordingly, site availability issues will not be designated for hearing.

[5] The ALJ is also directed, consistent with the efficient and orderly resolution of the cases pending before him, to expedite his consideration of the further hearings pursuant to the procedures set forth in the *Hearing Reform Report and Order*, 6 FCC Rcd 157 (1990), *reconsideration granted in part*, 6 FCC Rcd 3403 (1991). In this regard, we direct Ortiz and Rodriguez to file motions concerning discovery procedures within 10 days from the release date of this Memorandum Opinion and Order. Finally, absent good cause, any such discovery shall be completed within 30 days of the ALJ's action on such motions. *See Hearing Reform*, 6 FCC Rcd at 161 ¶ 30; 47 C.F.R. § 1.229(e).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION — File No. CSS-87-006-M/LA

Application for authority to modify its launch authorization for the INTELSAT VI (F-3) satellite

ORDER AND AUTHORIZATION

Adopted: April 23, 1992; Released: April 29, 1992

By the Chief, International Facilities Division:

1. The above-captioned application, filed on June 18, 1990, updated on March 24, 1992, by the Communications Satellite Corporation (Comsat), requests extension and modification of the Commission's Order and Authorization released March 19, 1990 (File No. CSS-87-006-LA, 5 FCC Rcd 1742 (1990)). The Order authorized Comsat to participate in the launch, positioning and in-orbit testing of the modified INTELSAT VI (F-3) satellite. The satellite was launched on a commercial Titan III launch vehicle from Cape Canaveral on March 14, 1990. Due to a failure of the second stage of the launch vehicle to separate from the satellite/perigee stage assembly at the proper time, the satellite was stranded in an unstable low earth orbit. Comsat now requests extension and modification authority to enable it to participate in an INTELSAT program to reboost the satellite from its low earth orbit to its originally planned slot in the geostationary orbit.

2. The application was placed on the Commission's Public Notice on July 3, 1990. No comments were received.

3. In July 1990, INTELSAT entered into contracts with the National Aeronautics and Space Administration (NASA), Hughes Aircraft Company (Hughes) and other entities for a shuttle reboost mission. The reboost mission will be performed by the STS-49 Endeavour, which is now scheduled for launch on May 7, 1992. During this mission, the shuttle crew will rendezvous with and capture the INTELSAT VI (F-3) satellite in its present lower earth orbit, after which the crew will attach a new perigee solid rocket motor and associated hardware to the satellite. Then the perigee motor will be fired to place the satellite on a supersynchronous transfer orbit. Subsequent satellite maneuvers will bring the satellite into its operating position of 325.5^0 East Longitude. It is anticipated that the INTELSAT VI (F-3) will be in service some time in June 1992.

4. The estimated costs associated with the reboost of the INTELSAT VI (F-3) are as follows (all amounts in real year dollars):

NASA	$ 93,155,000
Hughes	$ 45,893,000
TT&C	$ 4,805,000
Other external contract and contingencies	$ 3,367,000
TOTAL INTELSAT COST	$147,220,000
TOTAL COMSAT COST (based on current ownership share of 21.9 %)	$ 32,241,180

5. In view of the foregoing and the need to provide the necessary satellite facilities to meet traffic requirements, we conclude that the public interest would be served by a grant of the subject request. Accordingly, Comsat is AUTHORIZED to participate in the reboost and test program of the INTELSAT VI (F-3) satellite to be positioned at 325.5^0 East Longitude, subject to the following terms and conditions:

(a) This authorization is limited to the described program. Any change in the authorized location due to a launch delay or other circumstances will be considered upon a proper request by Comsat for authority;

(b) Comsat shall furnish via the INTELSAT VI (F-3) only those channels of communication for commercial service which have been, or may be, authorized by the Commission under Section 214 of the Communications Act of 1934, as amended;

(c) Within 30 days after completion of the testing program, Comsat shall provide the Commission with a summary report of its results and upon request, shall make the detailed test data available;

(d) Conduct of the program authorized here shall be without interruption of commercial satellite service now authorized at U.S. earth stations;

(e) Neither this authorization nor any right granted herein shall be assigned or otherwise transferred without approval of the Commission; and

(f) Unless extended or modified for good cause, this authorization shall terminate six months after the release date of this order.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION — File No. CSS-90-003-LA

Application for authority to participate in the launch of the INTELSAT K

ORDER AND AUTHORIZATION

Adopted: April 23, 1992; Released: April 29, 1992

By the Chief, International Facilities Division:

1. The Commission has under consideration application, File Number CSS-90-003-LA, filed by the Communications Satellite Corporation (Comsat) on June 14, 1990, and updated on March 24, 1992, for authority to participate in the launch, positioning and in-orbit testing of the INTELSAT K satellite. The application was placed on the Commission's Public Notice on June 20, 1990. Pan American Satellite (PAS) filed a petition to deny Comsat's application and Comsat filed an opposition thereto.[1]

2. In an order released October 18, 1990, the Commission granted Comsat's application to participate in INTELSAT's procurement of the INTELSAT K satellite. The Commission found that deployment of the INTELSAT K satellite is needed to accommodate a projected shortfall in Atlantic Ocean Region Ku-band capacity in 1993 and 1994.[2]

3. The INTELSAT K currently is in storage at the manufacturer's (GE Astro Electronics, Inc.'s) plant in East Windsor, New Jersey. About sixty days prior to launch, the spacecraft will be shipped by truck to ASTROTECH in Titusville, Florida for additional check-out and loading of propellants. From ASTROTECH the spacecraft will be transported by truck to Cape Canaveral Air Force Station and is expected to be launched approximately June 1, 1992, utilizing an Atlas IIA launch vehicle. This satellite will be positioned at 338.5^0 East Longitude in the Atlantic Ocean Region (AOR). It is anticipated that the INTELSAT K will be in service prior to the Summer Olympic Games in late July 1992.

4. The estimated costs associated with the INTELSAT K are as follows (all amounts in real year dollars):

GE Astro Contract (including delivery price, engineering changes and amendments)	$ 88.2 million
GE Astro Launch Support (to be determined)	
Performance incentives, capitalized	$ 2.3 million
Performance incentives, expensed	$ 12.7 million
Support Contract	$ 3.0 million
Launch Services	$ 58.3 million
TOTAL INTELSAT cost	$164.5 million
TOTAL Comsat cost (based on current ownership share of 21.9 %)	$ 36.03 million

5. In view of the foregoing and the need to provide the necessary satellite facilities to meet traffic requirements, we conclude that the public interest would be served by a grant of the subject request. Accordingly, Comsat is AUTHORIZED to participate in the launch and test program of the INTELSAT K satellite to be positioned at 338.5^0 East Longitude, subject to the following terms and conditions:

(a) This authorization is limited to the described program. Any change in the authorized location due to a launch delay or other circumstances will be considered upon a proper request by Comsat for authority;

(b) Comsat shall furnish via the INTELSAT K only those channels of communication for commercial service which have been, or may be, authorized by the Commission under Section 214 of the Communications Act of 1934, as amended;

(c) Within 30 days after completion of the testing program, Comsat shall provide the Commission with a summary report of its results and upon request, shall make the detailed test data available;

(d) Conduct of the program authorized here shall be without interruption of commercial satellite service now authorized at U.S. earth stations;

(e) Neither this authorization nor any right granted herein shall be assigned or otherwise transferred without approval of the Commission; and

(f) Unless extended or modified for good cause, this authorization shall terminate six months after the release date of this order.

6. IT IS FURTHER ORDERED that PAS's petition to deny the launch application is hereby dismissed.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] At the time PAS filed its petition to deny in response to the instant application, Comsat's application to participate in the procurement of the INTELSAT K satellite was still pending. The sole basis for PAS's petition to deny the launch application is that the Commission had not acted on the underlying procurement application, which was the subject of petitions to deny filed by PAS and Orion Network Systems, Inc. (Orion). Since the Commission has authorized Comsat's participation in the procurement of the INTELSAT K and, in the process, addressed all of the issues raised by PAS and Orion, PAS's petition is moot. *See infra* note 2.

[2] Communications Satellite Corporation, 5 FCC Rcd 5952 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Voices North, Inc. File No. BPH-900531MC

For Construction Permit for a
New FM Station on Channel 273A
in Warner Robins, Georgia.

MEMORANDUM OPINION AND ORDER

Adopted: April 16, 1992; Released: April 29, 1992

By the Commission:

1. The Commission has before it for consideration an Application for Review filed on behalf of Voices North, Inc. (Voices) seeking reinstatement of its application for a new FM station at Warner Robins, Georgia.[1] Voices' application was returned by the Fee Section when the applicant's fee payment instrument was dishonored by its bank. *See* 47 C.F.R. § 1.1107(b). The applicant's petition for reconsideration was denied by the Managing Director, and Voices seeks review of that decision.[2]

2. Voices argues that this case presents unusual circumstances that warrant reinstatement of its application. Voices states that one of its principals, Mr. John Norville, without the knowledge of the other principals, converted to his own personal use funds intended for deposit to Voices' bank account, thereby causing Voices' fee payment check to be dishonored. Voices believes reinstatement is justified because its remaining principals were innocent victims of Mr. Norville's wrongful act. Voices also contends that delay in the issuance of the Public Notice announcing the return of its application denied it any opportunity to make a substitute fee payment. The Applicant argues that the Managing Director should have afforded it an opportunity to cure its failed fee payment.

3. We affirm the decision of the Managing Director. The wrongful conversion of funds by an applicant's principal provides no basis for permitting an applicant to resubmit the application and proper fee payment after the expiration of the appropriate filing deadline. It is a cornerstone of our fee program that every applicant must assure that sufficient funds are available to honor its instrument of payment to the Commission at the time the instrument is presented for clearance. We are not concerned with determining fault for failed fee payments. *See* 47 C.F.R. §§ 1.1107(a), 1.1114(a); *Establishment of a Fee Collection Program*, 2 FCC Rcd 947, 957-958 (1987), *as modified*, 3 FCC Rcd 5987, 5991 (1988). We thus find that Voices and its remaining principals are not entitled to special consideration or relief.

4. Nor does the timing of the Public Notice returning Voices' application provide any basis for reinstatement. The Commission has assumed no obligation to inform applicants of fee defects in time to take corrective action within established filing deadlines. Voices' application, moreover, was filed on the last day of the window for Warner Robins' applications, and any Public Notice announcing the return of that application could not have been released until after the filing deadline. 47 C.F.R. § 1.1114(a)(2); *see also* 47 C.F.R. § 1.1107(b). Thus, any subsequent resubmission of the Voices' application would have been untimely in any event. 47 C.F.R. § 1.1114(a)(2); *see also* 47 C.F.R. § 1.1107(b).

5. Accordingly, It IS ORDERED, That the Application for Review filed by Voices North, Inc., on May 23, 1991, IS DENIED, and the underlying filing fee submitted with its Application for Review, in the amount of $2,030, will be refunded to Voices North, Inc.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] On April 17, 1991, the remaining applicants filed a Joint Motion for Approval of Settlement Agreements, which, if approved, would effect a universal settlement among those applicants.

[2] Warner Robins Communications, Inc., a competing applicant in the FM proceeding, opposed the Application for Review, and Voices replied to that pleading.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Century Telephone Enterprises, Inc.

Petition for Waiver of
Section 69.3(a) of the
Commission's Rules

ORDER

Adopted: April 23, 1992; Released: April 29, 1992

By the Chief, Common Carrier Bureau:

1. On March 20, 1992, Century Telephone Enterprises, Inc. (Century) filed a petition for waiver of the annual access tariff filing requirements of Section 69.3(a) of the Commission's Rules, 47 C.F.R. § 69.3(a),[1] with respect to the April 2, 1992 access tariff filing for Central Telephone of Ohio (Centel-Ohio). Century consummated its acquisition of Centel-Ohio from Centel Corporation on March 31, 1992. Century states that due to the timing of the acquisition Century does not have adequate time or data to determine the rate impacts of the acquisition and to prepare the requisite tariff filings prior to the July 1, 1992 effective date of the annual access tariff filing. Century Petition at 2.

2. On March 30, 1992, the Common Carrier Bureau (Bureau) established a pleading cycle on Century's petition.[2] In order to have sufficient time to consider Century's petition and any comments, the Bureau deferred the filing date for Century's 1992 annual access tariff filing for Centel-Ohio until May 1, 1992. No parties filed comments on the Century petition. However, the Public Utilities Commission of Ohio (PUCO) submitted reply comments on April 13, 1992. For the reasons specified below, we deny Century's petition for waiver. The Bureau does, however, grant Century another brief extension of time in which to file its 1992 annual access tariff.

3. Century requests deferral of the filing date for the 1992 annual access tariff in order to gain the operating experience it believes is necessary to forecast demand and estimate costs accurately for Centel-Ohio. *Id.* at 3. It proposes instead to file a "copycat" tariff maintaining Centel-Ohio's existing rates, terms, and conditions of service. *Id.* at 5. Century submits that it lacks experience with tariff preparation and contends that if the Commission requires Century to file its annual access tariff prior to July 1, Century will have to increase Centel-Ohio's access rates. *Id.* at 3. Century notes that Centel-Ohio's "marginal" revenues of $380,000 above the benchmark rate of return for 1991 will be offset by transitional separations factors coupled with normal investments to maintain and advance quality of service. *Id.* at 5.

4. PUCO supports Century's waiver request only to the extent necessary to permit Century adequate time to collect current operational data, develop rates, and prepare a tariff filing. PUCO suggests the Commission defer the effective date of Century's annual access tariff to November 1, 1992. PUCO Reply Comments at 2. PUCO is concerned that if the waiver is not granted, Century will attempt to join the National Exchange Carrier Association (NECA) access charge pool. *Id.* PUCO states that if Century adopts NECA rates in place of the current Centel-Ohio rates, both intrastate access charges and interstate access charges will increase approximately 100 percent, due to PUCO's requirement that the two rates mirror each other. *Id.* at 3. According to PUCO, Century would also immediately increase its interstate end user common line charge to multi-line business customers. *Id.*

5. Section 1.3 of the Commission's Rules provides that waiver petitions can be granted "if good cause therefor is shown." 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule if particular facts would make strict compliance inconsistent with the public interest. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969). However, "[a]n applicant for waiver faces a high hurdle even at the starting gate." *Id.* at 1157.

6. We conclude that Century has not provided a sufficient explanation for failure to file its 1992 annual access tariff in a timely manner. The Commission's annual access tariff filing requirement, which has been in effect since 1983, is widely known throughout the telephone industry. Therefore, Century should have been aware of this requirement throughout its negotiations with Centel to acquire Centel-Ohio, and should have been prepared to file an access tariff for its Ohio acquisition. Therefore, we conclude that good cause does not exist to support a waiver of Section 69.3(a) of the rules. The Bureau will, however, grant another brief extension for Century to compile and submit an annual access tariff for Centel-Ohio.

7. Accordingly, IT IS ORDERED that the petition for waiver of Section 69.3(a) of the Commission's Rules filed by Century Telephone Enterprises, Inc., IS DENIED.

8. IT IS FURTHER ORDERED that Century Telephone Enterprises, Inc., SHALL FILE its 1992 annual access tariff no later than May 15, 1992, to be effective July 1, 1992, on 47 days' notice.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[1] Section 69.3(a) of the Commission's Rules requires that tariffs for access service be filed with the Commission for an annual period. Such tariffs must be filed on at least 90 days' notice with a scheduled effective date of July 1. The 1992 annual access service tariffs were therefore required to be filed by April 2, 1992.

[2] *See Public Notice*, DA 92-390, released Mar. 30, 1992. Comments were due April 6, 1992 and replies were due April 13, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 30, 1992

SECTION 5301 OF THE ANTI-DRUG ABUSE ACT OF 1988: APPLICATION TO PRIVATE RADIO SERVICES

Section 5301 of the Anti-Drug Abuse Act of 1988 provides Federal and state court judges the discretion to deny Federal benefits to individuals convicted of offenses consisting of the distribution or possession of controlled substances. Under Section 5301, as implemented by Section 1.2002 of the Commission's Rules, 47 C.F.R. § 1.2002, an applicant for any new, modified, and/or renewed instrument of authorization from the Commission shall certify that neither the applicant nor any party to the application is subject to a Section 5301 denial of Federal benefits. For purposes of this certification requirement, a party to an application includes 1) an individual applicant; 2) if the applicant is a corporation, all officers, directors or persons holding 5% or more of the outstanding voting and/or nonvoting stock; and 3) if the applicant is a partnership, all nonlimited partners and any limited partners holding 5% or more interest. The Commission's Rules implementing Section 5301 became effective February 3, 1992.

Section 5301 applies to all Commission instruments of authorization in the private radio as well as all other services. For example, in the maritime radio services, certification is required for applications requesting radio equipment and radio operator exemptions and waivers issued pursuant to Sections 352 and 383 of the Communications Act, 47 U.S.C. §§ 352 and 383, as well as extensions of safety certificates issued pursuant to Regulation 14(d) of the International Convention for the Safety of Life at Sea, 1974, as amended.

Under Section 1.2002 of the Commission's Rules, failure of an applicant to certify will lead to dismissal of the application. In cases where an applicant cannot affirmatively certify that neither the applicant nor any parties to the application are subject to a denial of Federal benefits under Section 5301, the applicant will have 90 days from the date the application is filed to come into compliance with the rule through divestiture or removal of the offending party. Until Commission forms are updated accordingly, an applicant's signature to an application form will constitute certification for Section 5301 purposes. Applications for which there are no Commission forms, such as requests for Special Temporary Authority, require the submission of a signed statement that neither the applicant nor any party to the application is subject to a denial of benefits under Section 5301 of the Anti-Drug Abuse Act of 1988. Further, in the case of emergency applications for which there are no Commission forms, verbal certification may be acceptable under certain circumstances as, for example, when the applicant also simultaneously sends via facsimile written certification to the Commission. For further information, see *Report and Order*, 6 FCC Rcd 7551 (1991).

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-455

In the Matter of

Amendment of Section 73.202(b),	RM-5899 RM-6223
Table of Allotments,	RM-6224 RM-6225
FM Broadcast Stations.	RM-6226 RM-7111
(Perry, Cross City, Holiday,	
Avon Park, Sarasota,	
and Live Oak, Florida;	
Thomasville, Georgia)	

ORDER TO SHOW CAUSE

Adopted: April 13, 1992; Released; April 29, 1992

By the Acting Chief, Allocations Branch:

1. The Commission has before it the timely filed counterproposal in this proceeding by Pasco Pinellas Broadcasting Company ("Pasco"), licensee of Station WLVU, Channel 292A, Holiday, Florida, proposing the substitution of Channel 292C2 for Channel 292A at Holiday, and the modification of its Station WLVU license to specify operation on Channel 292C2.[1] In order to accommodate the upgrade at Holiday, Pasco has proposed two channel substitutions. First, Pasco proposed the substitution of Channel 293A for Channel 292A at Sarasota, Florida, and modification of the license of Station WSRZ, Channel 292A, Sarasota, to specify operation on Channel 293A. Second, Pasco proposed the substitution of Channel 256A for Channel 292A at Avon Park, Florida, and modification of the license of Station WWOJ, Channel 292A, Avon Park, to specify operation on Channel 256A. To implement these channel substitutions, we are issuing an *Order to Show Cause* directed to the licensee of Station WSRZ.[2]

2. We believe that an upgrade by Station WLVU would serve the public interest because it would provide Holiday with a wide-area FM service. Because changing the channel of Station WSRZ is a modification of license within the purview of Section 316 of the Communications Act of 1934, as amended, we are issuing an *Order to Show Cause* directed to Sarasota FM, Inc., licensee of Station WSRZ in Sarasota, to show cause why its license should not be modified. In accordance with Commission policy, Pasco has indicated its willingness to reimburse Station WSRZ and Station WWOJ for the reasonable costs of effectuating their channel substitutions.

3. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Sarasota FM, Inc., licensee of Station WSRZ, Sarasota, Florida, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 293A.

4. Pursuant to Section 1.87 of the Commission's Rules, Sarasota FM, Inc., may, not later than **June 22, 1992,** file a written statement showing with particularity why its license should not be modified as proposed in this *Order to Show Cause*. The Commission may call upon Sarasota FM, Inc., to furnish additional information. If this party raises a substantial and material question of fact, a hearing may be required to resolve such question of fact pursuant to Section 1.87 of the Rules. Upon review of the statements and/or additional information furnished, the Commission may grant the modifications, deny the modification or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Sarasota FM, Inc., will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued if the above-mentioned license modifications are found to be in the public interest.

5. IT IS FURTHER ORDERED, That a copy of this *Order to Show Cause* be sent BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the following:

Sarasota FM, Inc.
Radio Station WSRZ
1713 Ken Thompson Parkway
Sarasota, Florida 34236

Highlands Media
Company, Inc.
Radio Station WWOJ
3750 U.S. 27
Sebring, Florida 33870

Liebowitz & Spencer
3050 Biscayne Boulevard
Suite 501
Miami, Florida 33137
(Counsel for Highlands Media
Company, Inc.)

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[1] The Pasco counterproposal was originally included in "Joint Comments" along with a counterproposal by Women in Florida Broadcasting, Inc., proposing a Channel 295C2 upgrade at Cross City, Florida. The *Report and Order* in this proceeding, 4 FCC Rcd 5599 (1989), granted the upgrade at Cross City, but denied the Pasco counterproposal for a Channel 292C2 upgrade at Holiday. Subsequently, in a *Memorandum Opinion and Order* adopted April 10, 1992 (DA 92-468), we granted the Petition for Reconsideration filed by Pasco. Pursuant to that action, we are now considering the Pasco counterproposal.

[2] The proposed Channel 256A substitution at Avon Park necessitates Station WWOJ changing its transmitter site. In this regard, Highlands Media Company, Inc., licensee of Station WWOJ, has consented to the necessary transmitter site relocation and channel substitution. For this reason, we will not be issuing an *Order to Show Cause* directed to Highlands Media Company, Inc. The reference coordinates for the Channel 293A allotment at Sarasota, Florida, are 27-20-12 and 82-34-25. The reference coordinates for the Channel 256A allotment at Avon Park, Florida, are 27-33-37 and 81-29-36. We also note that Highlands has filed a counterproposal in MM Docket No. 89-455 for a Channel 256C3 upgrade for Station WWOJ, Avon Park, at coordinates 27-29-05 and 81-29-23. This site would also meet the minimum distance separation requirements for a Channel 256A allotment. The reference coordinates for the Channel 292C2 upgrade at Holiday, Florida, are 28-16-51 and 82-42-52.

Haley, Bader & Potts
2000 M Street, NW
Suite 600
Washington, D.C. 20036
(Counsel for Sarasota FM, Inc.)

6. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-22

In the Matter of	
Amendment of Section 73.202(b),	RM-7194
Table of Allotments,	RM-7359
FM Broadcast Stations.	
(Obion and Tiptonville,	
Tennessee)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 13, 1992; Released: April 29, 1992

By the Acting Chief, Allocations Branch:

1. At the request of Billy Gene Presson ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 623 (1990), proposing the allotment of Channel 267C3 to Obion, Tennessee, as that community's first local transmission service. Petitioner filed comments reaffirming his intentions to apply for the channel, if allotted. Obion County Broadcasters also filed comments supporting the allotment of Channel 267C3 to Obion and states its intention to apply for channel. WENK of Union City, Inc. ("WENK"), filed a counterproposal requesting the allotment of Channel 267C3 to Tiptonville, Tennessee.[2] Petitioner and WENK filed reply comments.

2. In its counterproposal, WENK requests the allotment of Channel 267C3 to Tiptonville, Tennessee, as that community's first local FM service. In support of its request, WENK states that Tiptonville is a city with a 1980 U.S. Census population of 2,438, whereas Obion has a population of 1,282. WENK states Tiptonville is the county seat of Lake County and has a full time police and fire departments and is the site of the only high school in the county. WENK describes Tiptonville as a thriving community in need of its first local FM service, whereas Obion County already has two local transmission services.[3]

3. In response to WENK's counterproposal, petitioner concedes WENK's proposal would provide the first local transmission service to the community of Tiptonville, however, petitioner believes the adoption of WENK's proposal would not result in a more efficient use of the spectrum. Petitioner contends that the Commission's decision should be based on a comparison of the area and population which can expect service from the new stations. To this end, petitioner submits that if Channel 267C3 is allotted to Obion the station's 1 mv/m contour will encompass 4,688.8 square kilometers with a population of 97,709, whereas the Tiptonville allotment will only reach 77,024 persons. Petitioner claims Obion should prevail on the basis of service to nearly 20,000 more people, citing *Boscawen and Belmont, New Hampshire*, 2 FCC Rcd 7309 (1987).

4. Review of the proposals indicates that Obion and Tiptonville are both deserving of an FM channel. In an effort to provide each community with its first local service, the staff performed a search to determine if alternate channels were available. The study indicates that Channel 267C3 is the only channel that can be allotted to either community. Therefore, our decision is guided by the guidelines set forth in *Revision of FM assignment Policies and Procedures*, 90 FCC 2d 88 (1982), which are:

(1) First full-time aural service;

(2) Second full-time aural service;

(3) First local service; and

(4) Other public interest matters.

[Co-equal weight given to priorities (2) and (3)]

Neither petitioner nor WENK has claimed that the allotment of Channel 267C3 at either community would provide any first or second full-time aural service but the allotment could provide each with its first local transmission service. Since the proposals would provide a first local transmission service to each community, thus fulfilling priority (3), we believe it is appropriate to base our determination on which proposal should prevail under priority (4) of the allotment criteria, other public interest factors. This priority permits the Commission to compare the availability of reception services and relative populations of each community. In this regard, both communities are well served with Obion receiving seventeen aural services and Tiptonville receiving eighteen.[4] However, the WENK proposal will provide a first local transmission service to a larger community.[5]

5. A staff engineering analysis confirms that an allotment to Obion would serve more people than an allotment to Tiptonville. Our analysis indicates that an Obion allotment would serve 106,059 people, whereas a Tiptonville allotment would serve 97,991 people. The difference in populations served is 8,068 people, far less that the nearly 20,000 people alleged by petitioner. Moreover,

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[1] The community of Tiptonville, Tennessee, has been added to the caption.

[2] Public Notice of the counterproposal was given on May 7, 1990, Report No. 1816.

[3] These services are Stations WKWT-FM and WENK-AM, which are both licensed to Union City, Tennessee.

[4] Obion and Tiptonville both receive AM service from Stations KHLS, Blytheville, Arkansas and WASL, Dyersburg, Tennessee. Both communities receive FM service from Stations KBOA, Kennett, Missouri, KLCN, Blytheville, Arkansas, KMIS, Portageville, Missouri, WENK, Union City, Tennessee, WTRO and WDSG, Dyersburg, Tennessee, KCRV, Caruthersville, Tennessee, WHBQ and WREC, Memphis, Tennessee. Obion receives FM service from Stations WYNU, Milan, Tennessee, WLOT, Trenton, Tennessee, WWYN, McKenzie, Tennessee, and AM services from Stations WMUF, Paris, Tennessee, WKZT, Fulton, Kentucky, WCMT, Martin, Tennessee, and WREC, Memphis, Tennessee. Tiptonville receives FM service from Stations KTMO, Kennett, Missouri and KMIS, Portageville, Missouri, and AM services from Stations KOSE, Osceola, Arkansas, KWOC, Poplar Bluff, Arkansas, KYMO, East Prairie, Missouri, KSIM, Sikeston, Missouri, and KTCB, Malden, Missouri.

[5] According to the 1990 U.S. Census, Tiptonville has a population of 2,149 while Obion has a population of 1,241.

petitioner has failed to provide a showing that any of the population he proposes to serve are unserved or underserved.[6] We do not believe this difference, absent any other public interest benefits, warrants allotting the channel to Obion. Therefore, we conclude that the WENK proposal should be adopted. *See Three Oaks and Bridgman, Michigan*, 5 FCC Rcd 1004 (1990); *Clarksville and Lane, Indiana*, 4 FCC Rcd 4968 (1989).[7]

6. We believe the public interest would be served by the allotment of Channel 267C3 to Tiptonville, since it could provide the community with its first local FM service. Channel 267C3 can be allotted to Tiptonville in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[8]

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 15, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Tiptonville, Tennessee	267C3

8. The window period for filing applications will open on **June 16, 1992,** and close on **July 16, 1992.**

9. IT IS FURTHER ORDERED, That the petition for Rule Making filed by Billy Gene Presson, seeking the allotment of Channel 267C3 to Obion, Tennessee, IS DENIED.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[6] Such comparisons are based on assumptions of transmitter sites and technical facilities that, prior to the selection of a permittee, cannot be relied upon. On the other hand, we can rely on the fact that the WENK proposal will provide a first local transmission service to the larger community, regardless of the selection of a transmitter site or technical facilities.

[7] In support of its proposal, petitioner cites *Boscawen*, wherein the Commission allotted a first local service to a larger community in a comparative proceeding. We find that the *Boscawen* decision, as relied on by petitioner, is inapposite. Petitioner submits a population analysis based on the primary service contours of the proposals at Obion and Tiptonville, whereas the *Boscawen* decision was based on U.S. Census Bureau population figures for each community.

[8] The coordinates for Channel 267C3 at Tiptonville are North Latitude 36-22-42 and West Longitude 89-28-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

EXECULINE of SACRAMENTO, INC.,
Complainant,

v. File No. E-90-256

PACIFIC BELL,
Defendant.

ORDER

Adopted: April 22, 1992; Released: April 28, 1992

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On May 18, 1990, Execuline of Sacramento, Inc. (hereinafter "Execuline") filed with the Commission the above-captioned formal complaint against Pacific Bell seeking recovery of damages for Pacific Bell's alleged overearnings for the period January 1, 1987, through December 31, 1988. In accordance with Commission rules governing formal complaint proceedings, Pacific Bell filed an answer to the complaint.

2. The parties to the above-captioned complaint have conducted discussions aimed at settling the complaint. As a result of these negotiations, the parties state that a mutually agreeable settlement of all pending controversies was reached. On April 3, 1992, the parties filed a joint motion seeking dismissal of the complaint with prejudice. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Joint Motion to Dismiss the above-captioned complaint IS GRANTED and that the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELESPHERE NETWORK, INC.,
Complainant,

v. File No. E-90-175

PACIFIC BELL,
Defendant.

ORDER

Adopted: April 22, 1992; Released: April 28, 1992

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On May 11, 1990, Telesphere Network, Inc. (hereinafter "Telesphere") filed with the Commission the above-captioned formal complaint against Pacific Bell seeking recovery of damages for Pacific Bell's alleged overearnings for the period January 1, 1987 through December 31, 1988. In accordance with Commission rules governing formal complaint proceedings, Pacific Bell filed an answer to the complaint.

2. The parties to the above-captioned complaint have conducted discussions aimed at settling the complaint. As a result of these negotiations, the parties state that a mutually agreeable settlement of all pending controversies was reached. On April 3, 1992, the parties filed a joint motion seeking dismissal of the complaint with prejudice. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Joint Motion to Dismiss the above-captioned complaint IS GRANTED and that the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
First Media of Monterey, Inc.

Licensee of Radio Station
WRJT-FM, Monterey, TN
for a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: April 22, 1992; Released: April 28, 1992

By the Chief, Mass Media Bureau

1. The Commission, by the Chief of the Mass Media Bureau acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration a $6,250 Notice of Apparent Liability (NAL) issued January 16, 1992. To date, no response to the NAL has been filed by First Media of Monterey, Inc.[1]

2. The forfeiture was assessed against First Media of Monterey, Inc., for its apparent willful violation of Section 73.1216 of the Commission's Rules. The Commission determined that the licensee of WRJT-FM failed to conduct a contest as announced. The facts are set forth in full detail in the NAL, and will not be repeated here.

3. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED, that First Media of Monterey, Inc., licensee of radio station WRJT-FM, Monterey, TN, Forfeit to the United States the sum of six thousand, two hundred, and fifty dollars ($6,250) for its apparent willful violation of Section 73.1216 of the Commission's Rules. Payment may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy Stewart
Chief, Mass Media Bureau

[1] On December 10, 1991, the NAL assessed against First Media of Monterey, Inc., was sent to its address of record. On January 13, 1992, the NAL was returned to our mail section with a notification of the new address of the licensee. On January 16, 1992, the NAL was sent to the licensee's new address.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 15, 1992

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON SWBT'S PETITION FOR STRUCTURAL RELIEF

CC Docket Nos. 88-2, Phase I, and 90-623

On April 3, 1992, the Southwestern Bell Telephone Company (SWBT) filed a notice of compliance with the Open Network Architecture (ONA) requirements for removal of the structural separation requirements that currently govern its participation in the enhanced services industry. Pursuant to the *BOC ONA Amendment Order*, 5 FCC Rcd 3103, the Bell Operating Companies (BOCs) are permitted to petition the Commission for relief from the structural separation requirements if the BOCs are technically prepared to offer their ONA services, have effective federal tariffs for each of their initial interstate ONA services, and have filed state tariffs for each of their initial intrastate ONA services. SWBT states that it satisfies all of the Commission's conditions for removal of the structural separation requirement.

Interested parties should file comments on SWBT's notice by **May 6, 1992,** and reply comments by **May 18, 1992,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should aiso be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036. Copies of SWBT's notice can be obtained from Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Part O
of the Commission's Rules
with Respect to Delegations
of Authority in Forfeiture
Proceedings

ORDER

Adopted: April 7, 1992; Released: April 14, 1992

By the Commission:

1. In 1989, Congress amended the Communications Act of 1934 to increase substantially the maximum amounts of forfeitures that may be imposed under section 503(b) and other sections of the Act.[1] By this *Order*, we amend our rules to increase the amounts of forfeitures that may be imposed by Commission Bureaus and Offices in forfeiture proceedings that are conducted under delegated authority.

2. Under the amended rules, the Chiefs, Mass Media Bureau, Common Carrier Bureau, Private Radio Bureau and Field Operations Bureau, and the Chief Engineer, will have delegated authority to act in forfeiture proceedings involving $20,000 or less, consistent with the statutory maximums set forth in the Act.[2]

3. These amendments concern rules of agency organization, practice or procedure. Compliance with the notice and comment and effective date provisions of the Administrative Procedure is therefore unnecessary. *See* 5 U.S.C. §§ 553(b)(A), 553(d).

4. Accordingly, pursuant to Sections 4(i), 4(j), 5(c) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C §§ 154(i), 154(j), 155(c) and 303(r), IT IS ORDERED that Part O of the Commission's Rules and Regulations is AMENDED as set forth in the Appendix attached hereto, effective upon publication in the Federal Register.[3]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 0 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part O continues to read as follows:

Authority: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, 225, unless otherwise noted.

2. Section 0.241(a)(8) is revised as follows:

CHIEF ENGINEER

§ 0.241 Authority delegated.

(a) * * *

(8) Authority to issue a notice of opportunity for hearing pursuant to § 1.80(g) of this chapter; and authority to issue notices of apparent liability, final forfeiture orders, and orders cancelling or reducing forfeitures imposed under § 1.80(f) of this chapter, if the amount set out in the notice of apparent liability is more than $20,000.

* * * * *

3. Section 0.243 is removed.

4. Section 0.283(c)(3) is revised as follows:

CHIEF, MASS MEDIA BUREAU

§ 0.283 Authority delegated.

* * * * *

(c) * * *

(3) Notices of opportunity for hearing pursuant to § 1.80(g) of this chapter, and notices of apparent liability, final forfeiture orders, and orders cancelling or reducing forfeitures imposed under § 1.80(f) of this chapter if the amount set out in the notice of apparent liability is more than $20,000, except that all forfeiture matters relating to the Commission's equal employment opportunity rules shall be referred to the Commission.

* * * * *

5. Section 0.291(f) is revised as follows:

CHIEF, COMMON CARRIER BUREAU

§ 0.291 Authority delegated.

* * * * *

(f) *Authority concerning forfeitures.* The Chief, Common Carrier Bureau shall not have authority to impose, reduce or cancel forfeitures pursuant to section 203 or section 503(b) of the Communications Act of 1934, as amended, in amounts of more than $20,000.

* * * * *

6. Sections 0.311(d)(1) and (d)(2) are revised as follows:

FIELD OPERATIONS BUREAU

§ 0.311 Authority delegated.

* * * * *

(d)

(1) The Chief of the Field Operations Bureau is authorized to issue notices of apparent liability, final forfeiture orders, and orders cancelling or reducing forfeitures, pursuant to § 1.80 of this chapter, if the amount set out in the notice of apparent liability is $20,000 or less. The Chief of the Field Operations Bureau is authorized to further delegate this authority.

(2) The Chief of the Field Operations Bureau is authorized to issue citations pursuant to § 1.80(d) of this chapter and to further delegate this authority.

* * * * *

7. Section 0.331(a)(9) is revised as follows:

CHIEF, PRIVATE RADIO BUREAU

§ 0.331 Authority delegated.

* * * * *

(a) * * *

(9) Authority to issue a notice of opportunity for hearing pursuant to § 1.80(g) of this chapter; and authority to issue notices of apparent liability, final forfeiture orders, and orders cancelling or reducing forfeitures imposed under § 1.80(f) of this chapter if the amount set out in the notice of apparent liability is more than $20,000.

* * * * *

FOOTNOTES

[1] Pub. L. No. 239, 101st Cong., 1st Sess., 103 Stat. 2131 (1989) (amending 47 U.S.C. §§ 202(c), 203(e), 205(b), 214(d), 219(b), 220(d), 362, 386, 503(b)). The Commission amended Section 1.80 of its Rules to reflect the section 503(b) increases. *Amendment of Section 1.80 of the Commission's Rules to Modify Forfeiture Amounts*, 5 FCC Rcd 3708 (1990).

[2] Consistent with current practice under 47 C.F.R. § 0.283(c)(5), we are also amending the rules to provide that the Chief, Mass Media Bureau, does not have delegated authority to assess forfeitures for apparent violations of the Commission's equal employment opportunity rules.

[3] Our rule amendments also delete 47 C.F.R. § 0.243 to conform with section 0.241 and with rule changes intended by the Commission in *Amendment of Part O of the Commission's Rules to Reformat and Simplify the Delegations of Authority to the Chief Engineer*, 60 RR 2d 884 (1986), and also clarify that subdelegation of forfeiture matters within the Field Operations Bureau is not limited to Engineers in Charge. *See also* 47 C.F.R. § 0.204(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN AIRLINES, INC.,
Complainant,

v.

U S WEST COMMUNICATIONS,	File No. E-90-395
PACIFIC BELL,	File No. E-90-396
NEVADA BELL,	File No. E-90-397
THE BELL TELEPHONE COMPANY OF PENNSYLVANIA,	File No. E-90-398
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	File No. E-90-399
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	File No. E-90-400
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-90-401
DIAMOND STATE TELEPHONE COMPANY,	File No. E-90-402
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-403
SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-90-404
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-405
NEW YORK TELEPHONE COMPANY,	File No. E-90-406
NEW ENGLAND TELEPHONE & TELEGRAPH COMPANY,	File No. E-90-407
WISCONSIN BELL, INC.,	File No. E-90-408
MICHIGAN BELL TELEPHONE COMPANY, and	File No. E-90-409
OHIO BELL TELEPHONE COMPANY,	File No. E-90-410

Defendants.

ORDER

Adopted: April 22, 1992; Released: April 29, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On August 27, 1990, American Airlines, Inc. (American) filed complaints against the above-captioned defendant local exchange companies (LECs) alleging that the LECs were double billing access minutes associated with calls forwarded from foreign exchange hunt group arrangements to 800 service. American sought refunds or credits of the alleged overcharges plus late fees paid, interest, and costs. On April 17, 1992, however, American and the LECs filed joint motions to voluntarily dismiss the complaints with prejudice stating that all claims against the LECs had been satisfactorily resolved by the parties.

2. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that American's and the LECs' Joint Motions to Dismiss the complaints with prejudice ARE GRANTED and that the above-captioned proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

CC Docket No. 92-24

In the Matter of

Local Exchange Carrier Line
Information Database

ORDER

Adopted: April 20, 1992; Released: April 20, 1992

By the Chief, Common Carrier Bureau:

1. On April 17, 1992, the Bell Atlantic Telephone Companies (Bell Atlantic) filed a motion for extension of time for filing a portion of its direct case as mandated by the *LIDB Designation Order*.[1] Bell Atlantic states that it requires additional time because it has encountered unexpected problems in assembling and analyzing its cost support information. Bell Atlantic Motion at 1. Bell Atlantic will provide its response to Issues I and II on April 21, 1992, as required by the *LIDB Designation Order*, but has requested that the Bureau grant Bell Atlantic an extension of two weeks, until May 5, 1992, for filing its response to Question III of the *LIDB Designation Order*. *Id.*

2. After evaluating Bell Atlantic's request the Bureau has determined that it would be in the public interest to extend the filing time for Bell Atlantic's response to Issue III of the *LIDB Designation Order*. The Bureau has also determined that, in light of this delay and for purposes of administrative efficiency in reviewing the pleadings in this proceeding, the public interest would be served by extending for two weeks the deadline for filing oppositions to or comments on the direct cases filed by each local exchange carrier subject to the *LIDB Designation Order*. The Bureau also extends by two weeks the filing period for rebuttals to those oppositions or comments.

3. Accordingly, IT IS ORDERED that the motion for extension of time filed by the Bell Atlantic Telephone Companies IS GRANTED.

4. IT IS FURTHER ORDERED that the filing periods for the investigation in CC Docket No. 92-24 are revised as follows: Bell Atlantic's response to Issue III of the *LIDB Designation Order* must be filed no later than **May 5, 1992;** any "Opposition to Direct Case" or "Comments on Direct Case" addressing the Bell Atlantic direct case or the direct case of any other local exchange carrier must be filed no later than **June 5, 1992;** any "Rebuttal" to oppositions or comments must be filed no later than **June 15, 1992.**

[1] *Local Exchange Carrier Line Information Data Base*, CC Docket No. 92-24, DA 92-347 (released Mar. 20, 1992) (*LIDB Designation Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-51

In the Matter of

Review of the Commission's
Regulations and Policies
Affecting Investment
in the Broadcast Industry

NOTICE OF PROPOSED RULE MAKING AND NOTICE OF INQUIRY

Adopted: March 12, 1992 **Released: April 1, 1992**

Comment Date: June 12, 1992
Reply Comment Date: July 13, 1992

By the Commission: Commissioner Quello issuing a statement; Commissioner Barrett concurring and issuing a statement; Commissioner Duggan issuing a separate statement.

I. INTRODUCTION

1. We initiate this proceeding to seek comment on possible means for reducing unnecessary regulatory constraints on investment in the broadcast industry. We believe this action is particularly appropriate now, since the availability of capital has recently become a matter of increasing concern to the industry.[1] We also believe that this action is necessary to ameliorate the difficulties that new entrants to this industry, including, in particular, minorities and women, have experienced in obtaining adequate financial backing and in successfully breaking into broadcast ownership.[2] Furthermore, the capital demands of the broadcast industry for all participants can only be expected to increase in the near future, as new technologies such as Digital Audio Broadcasting and Advanced Television are implemented. The availability of capital for such enterprises is likely to be a significant determinant of whether U.S. preeminence in the field of broadcasting will be preserved.

2. The broadcasting industry is a cornerstone of American commerce and, therefore, has substantial effects on other parts of the U.S. economy. In addition to the approximately $35 billion in revenues the industry generates directly each year,[3] investment in the commercial broadcasting industry results in production in a host of other industries. To cite one example, the U.S. television broadcasting system has resulted in a vibrant television programming production industry. These related industries are significant not only domestically, but also internationally. For example, in the international economic arena, the U.S. enjoys a significant comparative advantage over foreign competitors with respect to television production exports. In 1989, U.S. television production export totaled $1.696 billion, or roughly 71% of the world television production export.[4]

3. Given the significance of the domestic broadcasting industry to the economy, it is vitally important that our regulatory programs be as minimally burdensome on investment in the industry as possible, consistent with our statutory mandate. Therefore, in this proceeding we seek comment on several proposals for changes in the Commission's rules and policies which could increase and facilitate the availability of capital for investments in the broadcasting industry. Specifically, we initiate this proceeding to seek comment on requests by two parties[5] concerning the treatment of widely held limited partnership interests under our ownership attribution rules.[6] We also seek comment on requests by two other parties that might be relevant to the goals of this proceeding concerning the means by which creditors of broadcast licensees may secure their interests.

4. We also raise, on our own motion, a number of additional issues concerning capital investment in the industry. We seek comment on whether changes in certain of our ownership attribution standards, relating to both shareholder and partnership interests, might foster investment by reducing significant regulatory impediments. We also seek comment on any other actions the Commission might take to foster the availability of capital in the broadcasting industry. We especially seek comment on whether there are financing mechanisms available in other industries which might be used effectively in the broadcasting industry, if appropriate changes in the Commission's regulatory program were implemented.

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[1] We note that the Board of Governors of the Federal Reserve Board, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation recently altered guidelines and reporting requirements concerning highly leveraged transactions, finding that changed circumstances and an unintended and undue effect on the availability of capital justified relaxation of some guidelines. The majority of commenters in the proceeding leading to that action specifically raised concerns about the availability of capital to the media industries.

[2] In a related vein, we recently established a Small Business Advisory Committee. *See* Public Notice *FCC Establishes Small Business Advisory Committee* dated March 12, 1992.

[3] *See* Robert J. Coen, McCann-Erickson, Study prepared for *Advertising Age* (April 1991).

[4] Frost and Sullivan, "U.S. and International Program Production Market for Television and New Video Technologies," *excerpted in Television Business International*, May 1991, at 129.

[5] In addition to the four requests mentioned here (and further described below), all comments filed in response thereto (set forth in Appendices A and B) are hereby incorporated by reference into this rulemaking proceeding.

[6] 47 CFR §§ 73.3555 and 76.501. The ownership attribution rules, although contained in the section of our rules prohibiting certain types of multiple-station and cross-media ownership, also govern significant reporting obligations.

II. NOTICE OF PROPOSED RULE MAKING

A. Attribution of Ownership

5. The Commission's attribution criteria define what interests held in or relationships to media entities will be considered "cognizable" for purposes of applying the multiple ownership rules.[7] They "in essence constitute the means by which the media multiple ownership rules are implemented."[8]

6. *Stock interests.* Under existing standards, all non-voting stock interests (including most "preferred" stock classes) are generally not attributable. Any voting stock interest of 5% or more is generally considered attributable. Thus, for example, the current duopoly rule would prohibit an individual or entity from holding a 5% or greater voting interest in each of two television licensees in the same service with overlapping signal contours.[9] There are several exceptions to the presumption of attribution created by this 5% benchmark. Most notable among these for our present purposes is the "passive" investor exception, under which a defined class of institutional investors may hold up to 10% of a company's voting stock interest without incurring attribution. The Commission considers three types of entities to be "passive" for this purpose: (1) investment companies, (2) insurance companies, and (3) bank trust departments.

7. We believe that relaxation of all or some of these aspects of our attribution rules may substantially benefit the broadcast and cable industries by affording them access to new sources of capital as well as making available increased investment from existing capital providers. Greater access to passive investment should also prove especially beneficial to new entrants, including, in particular, minorities and women, who historically have experienced significant difficulty securing adequate start-up funding. Moreover, enhanced investment opportunities should provide all media companies with more choices in funding sources, decreased capital formation costs and ultimately more resources with which to provide service to the public.

8. In this *Notice,* we seek comment on three specific proposals. Commenters are expressly invited, however, to submit variations on or alternatives to these proposals.[10] Commenters presenting variant approaches should address the ways in which their proposal will advance our goal of increasing the flexibility of capital sources in media markets while adequately identifying influential ownership and positional interests in the application of our ownership rules.

9. First, we propose to raise the basic attribution benchmark from 5% to 10%, thereby doubling the permissible level of investment which the typical non-institutional investor could provide without fear of conflict with the multiple ownership rules.[11] This higher level of nonattributable investment may well attract new sources of capital to the media market and would inevitably create greater flexibility for existing investors to increase their participation in backing media ventures. While we previously considered a 10% basic attribution benchmark and rejected it,[12] that determination was made fully eight years ago in economic and competitive circumstances materially different from those which now prevail. In light of current market conditions, we believe that there is a need to reevaluate our earlier resolution of this matter. Accordingly, we ask commenters to consider how, in today's marketplace, we might preserve investment flexibility while adequately accounting for all influential interests which merit scrutiny under our rules.

10. Second, we propose to increase the existing attribution benchmark for passive institutional investors from 10% to 20%. This change should be particularly effective in increasing capital availability given the substantial resources which institutional investors, such as insurance companies and mutual funds, can make available to media enterprises. We believe that the inherently passive nature of the investors eligible to use this benchmark will adequately prevent undue influence that might otherwise be associated with the 20% benchmark. We note in this regard that licensees are required to certify that no passive investor "has exerted or attempted to exert any influence or control over any of the affairs of the licensee."[13] We would retain this requirement. Furthermore, while we previously rejected a proposed passive investor benchmark exceeding 10%, we did so out of a concern that "merely voting or trading large blocks of stock can affect the management of a company... and it appears that a block of 10% or more of voting stock approximates the shareholding level... that could often result in this effect, even if inadvertent and unintended."[14] This concern may be valid, but it is directed to a type of influence that is considerably more speculative and remote than the direct influence exercisable by non-passive investors. We question

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[7] The attribution standards are detailed in the notes to the multiple ownership rules. *See* 47 C.F.R. §§ 73.3555 and 76.501. These provisions were last reviewed comprehensively in 1984. *See Report and Order* in MM Docket No. 83-46, 97 FCC 2d 997 (1984) (*Attribution Order*), *reconsidered* 58 RR 2d 604 (1985) (*Attribution Reconsideration Order*), *further reconsidered* 1 FCC Rcd 802 (1986).

[8] *Attribution Reconsideration Order,* 58 RR 2d 604, 606 (1985) (footnote omitted).

[9] The relevant contour for commercial television is the predicted Grade B countour. 47 C.F.R. § 73.3555.

[10] We note that the Commission is statutorily prohibited from expending any of its appropriated funds "to repeal, to retroactively apply changes in, or to begin or continue a reexamination of the rules and the policies established to administer such rules of the Federal Communications Commission as set forth at section 73.3555(c) of title 47 of the Code of Federal Regulations." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-140, 105 Stat. 782, 797 (1991). Section 73.3555(c) prohibits ownership of a daily newspaper and a broadcast station in the same market. We therefore will not consider any changes in the attribution rules to the extent such changes fall within the scope of this prohibition. We ask for comment on whether the proposed changes in the attribution rules would fall within the scope of the prohibition and should be limited accordingly.

[11] Because we propose no change in our Rules which treat positional interests, *e.g.,* officer and director, as cognizable ownership interests, our proposed changes would not permit evasion of our underlying concerns with diversity and competition. Combining an otherwise non-attributable ownership interest with a positional interest that provides significant opportunities to influence a licensee's affairs will continue to trigger application of our Rules.

[12] *See Attribution Order, supra* at 1006.

[13] *Attribution Order, supra* at 1014; FCC Form 323 (Ownership Report), Instruction 6.

[14] *Attribution Order,* 97 FCC 2d at 1013 (footnotes omitted).

whether it continues to represent the kind of risk which warrants a 10% benchmark restriction on passive investment.

11. Finally, we propose to broaden the class of investors eligible for passive institutional status and therefore eligible to use the higher attribution benchmark. Specifically, we seek comment on affording Small Business and Minority Enterprise Small Business Investment Companies (SBICs and MESBICs) such status.[15] We tentatively conclude that new entrants and minority owners could be substantially assisted by relaxing the restrictions which the existing 5% attribution standard places on the investments of SBICs and MESBICs in media companies. In this regard, we note that while there has been growth in the absolute number of minority-owned broadcast entities in the years since our last attribution order, there has been little change in the percentage of all broadcast stations owned by minorities. Moreover, it is the limited availability of capital that has historically laid at the heart of this problem.[16] The four-fold increase in the attribution limit (from 5% to the proposed 20%) which this proposal would provide for investment companies targeted to small and minority enterprises should afford some measurable relief in this area. Further, while we have recognized that SBICs and MESBICs are not entirely passive in nature,[17] the circumstances under which they might enter and direct or definitively influence the affairs of a debtor company are narrow and are subject to regulation by the Small Business Administration.[18] We thus seek comment on whether we should now grant SBICs and MESBICs passive status and the benefits in terms of investment flexibility which such status confers.[19]

12. *Partnership Interests.* Under the Commission's ownership attribution rules,[20] all partners in a general partnership, regardless of equity interests, are attributed with ownership. The rules with regard to limited partnerships establish certain criteria to be applied in determining whether limited partners are sufficiently insulated from "material involvement" in the management or operation of the partnership's media related activities to be exempt from attribution.[21]

13. Currently pending before the Commission are two Petitions seeking Declaratory Rulings regarding application of the attribution rules to limited partnership interests, one by Kagan Media Partners (Kagan) and the other by Equitable Capital Management Corporation (Equitable). Both Petitions request a finding that the provisions of their limited partnership agreements, which admittedly do not comply with the current insulation criteria, nonetheless sufficiently insulate the limited partners from involvement in the management and operation of the partnership's media holdings so that the limited partners' interests in those media investments should be exempt from attribution.[22] In response to an August 17, 1990 Public Notice, three parties filed comments and/or reply comments.

14. In essence, these Petitions seek exemptions from the Commission's attribution criteria for "business development companies" organized as limited partnerships. Business development companies are a special class of investment vehicle organized for the purpose of providing transitional and intermediate financing, as well as management assistance, to small- and medium-sized companies. The investments of business development companies are restricted to ensure that such companies provide capital to developing or financially troubled companies. Such companies are typically structured as limited partnerships to take advantage of favorable "pass-through" tax treatment made available to partnerships by the Internal Revenue Service. As "business development companies," the partnerships are regulated under the Investment Company Act of 1940, 15 U.S.C. §§ 80(a) *et seq.* ("Investment Company

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[15] The Small Business Administration licenses SBICs and MESBICs to act as vehicles through which it provides advisory services and venture capital in the form of equity financing and long-term loan funds to small business and minority-owned concerns.

[16] *See Strategies for Advancing Minority Ownership Opportunities in Telecommunications*, Final Report of the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications (May 1982).

[17] *See Attribution Order*, 97 FCC 2d at 1016.

[18] For example, 13 CFR Section 107.801(a) generally prohibits permanent control by SBICs of the small concerns in which they invest, noting that the "[Small Business Investment] Act does not contemplate that Licensees [SBICs] shall operate business enterprises or function as holding companies exercising control over such enterprises." Section 107.801(c) limits temporary control by SBICs of client debtors only to situations where it is "reasonably necessary for the protection of [the SBIC's] investment." Such control is subject to SBA oversight and would, where a Commission licensee is involved, require our prior consent as well. *See* 13 CFR Section 107.801(d) and (e), and Section 310(d) of the Communications Act of 1934, as amended. Moreover, the provision by an SBIC of management advice to its client debtors is also regulated. Section 107.501 providing, for example, that any management services rendered "may be advisory only."

[19] In 1984, the Commission suggested that SBICs and MESBICs might obtain the type of investment security they sought when investing in broadcast enterprises through non-attributable equity interests such as non-voting stock or convertible warrants. 97 FCC 2d at 1016. The Commission concluded that the flexibility afforded by a higher, passive-investor attribution benchmark was therefore unnecessary. Given the persistently low percentage levels of minority ownership of broadcast media in the intervening years, however, we believe it is appropriate that this judgment, at odds with the views of SBIC interests filing comments at that time, be revisited.

[20] 47 C.F.R. § 73.3555, n.2, and § 76.501, n.2.

[21] Note 2(g)(2) of the multiple ownership rules cross references the *Attribution Order*, *supra* and *Attribution Reconsideration Order*, *supra*, which established the criteria necessary to assure adequate insulation with respect to limited partnerships. The following provisions, among others, are provided as indications that limited partners are sufficiently insulated: (1) The partnership agreement may permit the exempt limited partners to vote on the admission of additional general partners, but the general partner should be empowered to veto any such admissions; and (2) the partnership agreement should prohibit the exempt limited partners from voting on the removal of a general partner except where the general partner is subject to bankruptcy proceedings, is adjudicated incompetent by a court of competent jurisdiction, or is removed for cause as determined by an independent party.

[22] Equitable's Petition specifically requests such a ruling so that its limited partners would be entitled to use the "multiplier" provision of the ownership rules in calculating compliance with the alien ownership limits set forth in Section 310(b) of the Communications Act. *See Wilner & Scheiner*, 103 FCC 2d 511 (1985).

Act"), and are also subject to the securities laws of each state in which partnership interests are offered or sold. Under both federal and state securities regulatory systems, limited partners must be afforded the right to vote on the election and removal of general partners. The Commission's insulation criteria, however, require the absence of such voting rights, in conjunction with other insulating provisions, to support a presumption that the limited partners are insulated from the management and operation of the partnership's media activities.

15. The petitioners assert that federal and state securities laws thus prevent them from conforming their partnership agreements to comply with the Commission's current insulation criteria. However, petitioners believe that their partnership agreements provide sufficient insulation to satisfy the Commission's concern that the limited partners be precluded from material involvement in the management or control of the partnership's media investments. Moreover, because these partnerships are nationwide, publicly-offered, widely-held limited partnerships, with thousands of potential limited partners each owning very small percentages of the total equity, the likelihood that the limited partners will join together and use their collective removal and appointment powers to exert influence over the general partner and thereby control the management or operations of the partnerships' media interests is slight. Any individual partner's ability to influence such an outcome would generally be limited (or could be required to be limited) in proportion to its ownership interest. Petitioners argue that the degree of influence of their limited partners are akin to small minority shareholders in a publicly-held corporation for whom attribution is determined according to a stock ownership threshold. Commenting parties unanimously support the relief requested by Kagan and Equitable.

16. We believe that the strict application of our current attribution criteria to "business development companies" may impede the ability of these limited partnerships to make capital investments in broadcast entities and to attract a large pool of limited partners. Therefore, we propose to modify our insulation criteria as it applies to these widely-held limited partnerships, so as to eliminate as much as possible the current conflict with federal and state securities laws. Alternatively, we could combine an equity ownership standard specific to these partnerships with a more limited relaxation of specific insulation requirements.[23] We seek comment on whether this accommodation of our attribution rules is necessary to facilitate the ability of these types of limited partnerships to invest capital in the broadcast industry.

17. In light of the objectives of this proceeding, we also request comment on whether our attribution criteria for all widely-held limited partnerships should be modified to recognize insulation where limited partners hold an insignificant percentage of the total equity in the partnership. It has been argued that some limited partners are the functional equivalent of small minority shareholders in a publicly-held corporation and therefore are unable to exert influence beyond the amount of their equity share. We seek comment generally on what attributes of a limited partnership should indicate to the Commission that a requisite degree of insulation exists to permit limited partners to be treated similarly to minority stockholders in a corporation. We also seek information on whether there are particular types of partnerships that have consistent characteristics that would permit such an analysis as a matter of course, without case-by-case analysis. Although the Commission previously rejected extending the 5% voting stock threshold to limited partnership interests,[24] we request comment on whether this or some other percent of equity ownership in a widely-held limited partnership would be appropriate where these identified attributes exist. Commenters should include the level at which they believe limited partners' equity interests do not provide adequate insulation and, thus, should be cognizable. In addition, commenters should address whether such a change would allow limited partners the ability to materially influence or control the partnership's media investments. We further request comment as to whether we should distinguish widely-held partnerships from other types of partnerships and, if so, what criteria should define "widely-held."

B. Security and Reversionary Interests in Broadcast Licenses

18. *Background.* Pending before the Commission are two Petitions for Declaratory Ruling that raise issues concerning the ability of creditors to take either a limited security interest or a reversionary interest in an FCC broadcast license. The law firm of Hogan & Hartson filed a Petition requesting that the Commission permit third party creditors to obtain security interests in the license of a broadcast station.[25] Foreclosure on such interests would be subject to prior FCC approval. In addition, the law firm of Crowell & Moring filed a Petition asking the Commission to clarify Section 73.1150 of its Rules by defining the phrase "right of reversion" so as to allow a seller of a broadcast station to regain control of the license, subject to prior Commission approval. In response to a March 15, 1991 Public Notice soliciting comments on these Petitions,[26] 27 parties filed comments and/or reply comments.

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[23] Under the main proposal (as well as under current policy), limited partnership interests that meet all of the extant insulation criteria can be of any size without attribution, while those that fail any one of the criteria are presumptively attributed, no matter how small the equity interest, although that presumption could be challenged. The alternative approach would be to not attribute an ownership interest even if certain of the insulation criteria are not satisfied, as long as the equity interest remains below a specified benchmark.

[24] *Attribution Further Reconsideration Decision*, 61 RR 2d 739, 746.

[25] Under Section 1-201 of the Uniform Commercial Code, a security interest is defined as "an interest in personal property or fixtures which secures payment or performance of an obligation."

[26] There is significant overlap in the issues raised by the Petitions. Indeed, the Crowell & Moring Petition essentially seeks a declaration permitting *licensees* to retain a security interest in the license of a station when the station is sold -- a variation of Hogan & Hartson's request to allow *third parties* to hold security interests in a license. The comments to the Petitions, however, primarily address Hogan & Hartson's position on third party creditors, and those comments that did address the Crowell & Moring proposal generally do not discuss reversionary interests as separate from other security interests. To

19. The petitioners and supporting commenters submit that adoption of their proposals will produce several effects of benefit to the broadcasting industry, and thus will further the public interest.[27] The central argument made by these parties is that allowing security interests will increase the availability of capital to the industry. They believe that the Commission's current policies may artificially suppress the availability of funds, and that easing the availability of credit for broadcast lending may foster the entry of new participants. Specifically with regard to seller financing, Crowell & Moring argues that allowing former licensees to retain a reversionary interest in the license will ease entry by minority or other new broadcasters. According to Crowell & Moring, new entrants seldom have sufficient resources to self-finance and generally face obstacles to obtaining third party financing not encountered by more experienced broadcasters.

20. Commenters opposing a change in Commission policy argue that the benefits to be derived from allowing security interests are speculative at best, and that permitting security interests will have negative effects on the industry. According to Capstar Communications, Inc. *et al.* (Capstar),[28] possession of a security interest will enable lenders to gain a property right that is independently enforceable outside the bounds of the Commission's statutory control, such as in a state court, creating chaos for the Commission as it attempts to carry out its regulatory function.[29] In addition, the Motion Picture Association of America (MPAA) argues that allowing security interests will remove an important incentive for unsecured creditors such as program suppliers to provide goods and services to licensees. According to MPAA, without a policy by which all creditors, on a *pro rata* basis, share in the value of a station attributable to the license in the event of default, program suppliers would not extend credit to licensees and the public would suffer as a result.

21. The Petitioners' proposals raise serious concerns. Foremost, we must begin by examining the requirements and possible limitations of the Communications Act. We must also assess the costs and other potential disadvantages of changing our rules, and weigh those against the anticipated benefits. Furthermore, we note a split of opinion in recent bankruptcy court cases regarding the permissibility of security interests in broadcast licenses.[30] Accordingly, we seek additional comment on both the statutory and poicy implications of the Petitions before us.

22. *Statutory considerations.* We historically have taken the view that our rule prohibiting sellers from retaining a reversionary interest[31] and our policy prohibiting third party security interests[32] were based upon statutory provisions prohibiting the grant of ownership interests in the spectrum[33] and the assignment by licensees of their interests in a license without prior Commission approval.[34] In a recent case, however, we found that there were no statutory bars in a related context -- the sale of a "bare" construction permit for a cellular authorization. *Bill Welch*, 3 FCC Rcd 6502, 6503 (1988). Although we limited *Welch* to the cellular industry, the statutory analysis in that case raises questions as to whether our reverter and security interest policies concerning the broadcast industry are statutorily mandated.[35] According to petitioners and supporting commenters, reversionary and security interests could be viewed merely as rights between private parties that can be exercised only upon Commission approval[36] and, therefore, would be fully consistent with the provisions of the Communications Act. In light of the analysis in *Welch*, we seek comment on whether the Communications Act prohibits security or reversionary interests in licenses *per se*. Commenters are also asked to address what legal implications a conclusion that the Communications Act does not preclude such interests may have under commercial transaction laws such as the Uniform Commercial Code (UCC).

23. *Policy considerations.* In addition to the statutory issues raised above, we have a number of fundamental policy concerns that must be weighed in deciding whether to permit security or reversionary interests in broadcast licenses. First, we question whether granting such interests would be effective in increasing capital availability, and we seek specific comment assessing the likelihood of such an increase. In this regard, we also ask whether other financing arrangements might be disturbed. For example, it has been argued that other creditors (*e.g.*, program suppliers) would be less likely to extend credit to stations if their positions relative to the senior lender were subordinated. Second, we are concerned that the independence of stations be maintained if security interests are permitted. Thus, we seek comment on the effect that holding a security or reversionary interest in a license may have on the likelihood that creditors will attempt to exercise control or have substantial influence over a borrower station. Is there a greater likelihood of entanglement between the creditor and the licensee where the lender is the former

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the extent that different policy considerations attach to seller as opposed to third party financing, commenters in this proceeding should provide separate discussion.

[27] Several parties have asked the Commission to take a broader approach by overturning FCC policies against security interests in non-broadcast licenses. Sound licensing practice, however, requires that the Commission consider the particular circumstances of each industry before reaching conclusions as to the advisability of permitting security interests in any given service. In this proceeding, our consideration of this issue is specifically limited to the broadcast services.

[28] Capstar is joined in its comments by Command Communications, Inc., Jones Eastern Broadcasting, Inc., Legacy Broadcasting, Inc., Liggett Broadcasting, Inc. and Sinclair Broadcast Group, Inc. The joint comments filed by these parties were the only comments filed by broadcast licensees.

[29] Capstar cites Section 9-503 of the Uniform Commercial Code which provides: "Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action." U.C.C. §9-503 (1990).

[30] *Compare In re TAK Communications Inc.*, Case No. MM11-91-00031 (Bankr. W. D. Wis. Sept. 24, 1991) *aff'd* Case No. 91-C-935-C (W. D. Wis. Mar. 23, 1992) *with In re Ridgely Communications Inc.*, Case No. 89-5-1705-JS (Bankr. D. Md. Nov. 21, 1991).

[31] 47 C.F.R. § 73.1150.

[32] *Kirk Merkley*, 94 FCC 2d 829 (1983); *Radio KDAN*, 11 FCC 2d 934, *on recon.*, 13 RR 2d 100, 102 (1968), *aff'd on other grounds sub nom. Hansen v. FCC*, 413 F.2d 374 (D.C. Cir. 1969).

[33] 47 U.S.C. §§ 301, 304, 309(h)(1).

[34] 47 U.S.C. §§ 310(d), 309(h)(2).

[35] We do not propose here to change our rule prohibiting the for-profit sale of unbuilt broadcast construction permits. *See* 47 C.F.R. § 73.3597.

[36] *See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 99 F.C.C. 2d 1249 (1985).

licensee of the subject station? Third, we ask whether safeguards will be necessary to ensure that transfers of control do not take place without the Commission's prior approval, as required by the Communications Act. Fourth, we question whether allowing security interests will discourage lenders from helping stations work past temporary financial difficulties. Finally, we seek comment on the applicability of any action taken in this proceeding to existing contracts. We request comment on each of these areas of concern. In structuring their discussion, commenters should bear in mind the general framework afforded these issues by the comments filed in response to the Public Notice. Using these comments as a backdrop, we ask commenters to provide specific information and detailed analysis of their respective positions.

III. NOTICE OF INQUIRY

A. Other Financing Mechanisms

24. In conjunction with our interest in reducing regulatory burdens on investment in broadcasting, we seek comment on whether alteration of other Commission rules or processes might enable enterprises to raise capital more efficiently or at less expense. In this regard, we ask commenters whether it is possible, through regulatory reform, to reduce certain risks associated with debt instruments in the broadcasting industry by enhancing the liquidity and marketability of these securities for potential investors without undermining our public policy or regulatory goals. In particular, we seek comment on whether standardized debt pooling mechanisms could facilitate access to capital by broadcasters, similar to arrangements established in venture capital funds or student loan, insurance and mortgage packages. Commenters should address whether there are fundamental characteristics that would distinguish other debt pooling mechanisms from debt packaging arrangements in broadcasting, thus limiting the viability or marketability of the broadcasting package. In addition, we seek broad-ranging comment regarding any additional steps that the Commission could pursue in order to facilitate access by broadcasters to capital markets.

IV. CONCLUSION

25. We have launched this proceeding in order to consider ways, in today's competitive marketplace, to strengthen the economic viability of our domestic broadcast industry and to facilitate entry therein. Specifically, we believe that the availability of investment capital is critical to the future of the industry. The proposals presented herein are designed to ease regulatory burdens on capital formation and therefore increase access to new capital resources for broadcasters in the years to come.

V. ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

26. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

Comment Information

27. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **June 12, 1992,** and reply comments on or before **July 13, 1992.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

28. As required by § 603 of the Regulatory Flexibility Act, the Commission has prepared the following Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981)).

29. **Reason for the Action:** The purpose of this *Notice* is to consider proposals for changes to the Commission's rules and policies which impact the availability of capital for investment in the broadcasting industry.

30. **Objective of this Action:** This action is intended to determine whether, and if so, in what circumstances, Commission policy might be changed, consistent with statutory mandates, to reduce government regulation on investment in the broadcast industry.

31. **Legal Basis:** Authority for the actions proposed in this *Notice* may be found in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 and 303.

32. **Reporting, Recordkeeping, and Other Compliance Requirements Inherent in the Proposed Rule:** None.

33. **Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rule:** None.

34. **Description, Potential Impact and Number of Small Entities Involved:** Approximately 10,000 existing broadcasters of all sizes and an unknown number of potential broadcasters may be affected by the proposals contained in this *Notice*. In addition, an unknown number of financial institutions may be affected.

35. **Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives:** The purpose of this *Notice* is to seek comment on issues regarding the concerns raised in the Petitions, including alternatives that would minimize the impact on small entities.

Additional Information

36. For additional information on this proceeding, contact Eugenia R. Hull, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Comments and Reply Comments filed to date in MMB File No. 910221A and MMB File No. 870921A

Comments

1. American Security Bank
2. Ameritrust Company, National Association; Chemical Bank and New Bank of New England, N.A.
3. Bank of America
4. Broadcast Trustee Management, Inc.
5. Burr, Egan, Deleage & Co.
6. Canadian Imperial Bank of Commerce
7. Capstar Communications, Inc.; Command Communications, Inc.; Jones Eastern Broadcasting, Inc.; Legacy Broadcasting, Inc.; Liggett Broadcasting, Inc. and Sinclair Broadcast Group, Inc.
8. Chase Manhattan Bank
9. Den Norske Bank
10. First National Bank of Boston
11. First National Bank of Chicago
12. General Electric Capital Corporation
13. Heller Financial, Inc.
14. J.P. Morgan & Co., Inc.
15. Kansallis-Osake-Pankki
16. Morrison & Foerster
17. Norwest Bank Minnesota
18. O'Melveny & Myers
19. Ropes & Gray
20. Santarelli, Smith & Carroccio
21. Security Pacific Corporation
22. Semmes, Bowen & Semmes
23. Wireless Cable Association, Inc.

Reply Comments

1. Ameritrust Company National Association; Chemical Bank and New Bank of New England, N.A.
2. Capstar Communications, Inc.; Command Communications, Inc.; Jones Eastern Broadcasting, Inc.; Legacy Broadcasting, Inc.; Liggett Broadcasting, Inc. and Sinclair Broadcast Group, Inc.
3. Hogan & Hartson
4. Morrison & Foerster
5. Motion Picture Association of America
6. Motorola, Inc.
7. National Association of Broadcasters
8. Santarelli, Smith & Carroccio

APPENDIX B

Comments and Reply Comments filed to date in MMB File No. 900924A

Comments

1. ML Media Partners, L.P.
2. Sacramento RA Limited Partnership

Reply Comments

1. Equitable Capital Management Corporation

Statement of Commissioner James H. Quello

Notice of Proposed Rulemaking and Notice of Inquiry, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry

This proceeding is a timely review of Commission policies that affect the ability of broadcast companies to attract capital. Rather than examine each of the policies in isolation, I wholeheartedly endorse the idea to consolidate the various proposals in a comprehensive Notice.

This is not to suggest, however, that I necessarily endorse any of the proposals themselves. In particular, I am skeptical that allowing security interests or reversionary interests in broadcast licenses can be reconciled with the Communications Act. But I am willing to listen to the arguments that will be presented in the comments.

I hope that by making some minor rule adjustments, the Commission can encourage investment in broadcasting. Consequently, commenters should not limit themselves to the options presented in this Notice, but should feel free to make any suggestions that would help attain this goal.

CONCURRING STATEMENT OF COMMISSIONER ANDREW C. BARRETT

In re: Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry

I am fully aware of the economic health of the radio industry. I agree that the Commission should take steps to alleviate the genuine burdens facing the industry. However, we should do so in a manner that remains true to the Commission's public interest goals. We should not totally abandon our past policy objectives based on temporary market conditions. I support many of the ideas that have been put forth today under the rubric of regulatory reform. I am more cautious in my approach to this item and the two other items on the agenda dealing with the broadcast industry.[1]

While I welcome this opportunity to explore modifications to the Commission's policies and rules in order to encourage investment in the broadcast industry, I have concerns regarding some of the proposals outlined in this item. My concerns relate to the section of this Notice of Inquiry/Notice of Proposed Rulemaking dealing with the grant of security or reversionary interests in a broadcast station license, and the modification of the attribution limit for "active" investors.

I have serious doubts about the Commission's statutory authority to permit reversionary and other security interests in broadcast licenses. The Commission has previously determined that a broadcast license does not confer upon the holder the ability to provide for a reversionary or a security interest in the license.[2] I understand that in 1988 in the cellular context, the Commission determined that the prohibition was not mandated by statute.[3] However, this cellular ruling does not persuade me that the prohibition on reversionary and security interests in the "broadcast" context can be modified without violating the Commission's statutory mandate. I plan to closely examine arguments suggesting that the statute may not be a bar to modification or elimination of the prohibition. I expect parties commenting on this issue to set forth specific legal analysis of the statutory provisions, their legislative history and a rationale for their conclusions.

In addition to a statutory concern, I must question the policy implications of granting a security or reversionary interest in a broadcast station license. I would encourage parties commenting on this issue to provide concrete evidence that permitting reversionary or security interests in broadcast station licenses will in fact increase capital availability. I also have concerns about the implications to granting security interests with respect to other financing arrangements.

I must concur to the portion of the item relating to modifying the attribution of ownership criteria. The interplay between modifying the rules relating to voting stock interest and changes in the national and local radio ownership rules have the potential to cause serious damage to the concept of diversity. Raising the basic attribution benchmark from 5% to 10% would create incentives for greater concentration in the radio industry at a time when this Commission has voted to permit the ownership of up to 6 stations in the local market and 60 stations in the national market. As outlined in my statement in the radio ownership docket, I view the modifications to the ownership rules as the initial abandonment of our traditional concerns for diversity, and the fostering of new entrants into the broadcast industry. Similarly, the proposed change in the attribution rule can be viewed as an attack on these principles. Modifying the ownership rules accomplishes only one goal. It permits existing broadcasters or those with ownership interests in broadcast properties to increase their interest. Thus, the removal of the voting stock interests as proposed in this item could, in a real sense, curtail investments from new entrants to the broadcast industry. New entrants, including women and minorities, have the ability, at a lower cost than full ownership of a station, to enter the broadcast industry through stock purchases. These participants can begin to actively participate in the industry through relatively modest costs. The proposals contained in our Notice have the potential to remove this option for new participants. While this item discusses the ability of minorities and women to attain new financing sources through the modification of the attribution limits, I question who really benefits from the proposed modifications.[4]

I do agree with the suggestions made in the item to explore raising the passive ownership limits and broadening the class of investors for passive status. Perhaps, these proposals can provide a real avenue for providing financing for new entrants, including minorities and women. I look forward to the comments on the benefits and detriments of modifying the passive ownership attribution limits.

Although I do not have a closed mind on the issues raised in this proceeding, the burden on adjusting the active attribution criteria clearly will rest with those proposing modification. I would suggest the comments provide clear examples of other administrative agencies that utilize such high attribution standards. I would recommend that they discuss realistic safeguards that should be adopted with the rules. Finally, I urge commenting parties to demonstrate how relaxation of the rules on ownership and the attribution standards are consistent with the Commission's public interest mandate with regard to programming diversity.

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[1] *See, e.g.*, Dissenting Statement of Commissioner Andrew C. Barrett in MM Docket No. 91-140, adopted March 12, 1992.

[2] *See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 99 FCC 2d 1249 (1985); *Kirk Merkley*, 94 FCC 2d 829 (1983); *Radio KDAN*, 11 FCC 2d 934, *on recon.*, 13 RR 2d 100.102 (1968), *aff'd on other grounds sub nom. Hansen v. FCC*, 413 F.2d 374 (D.C. Cir 1969).

[3] *See Bill Welch*, 3 FCC Rcd 6502, 6503 (1988).

[4] Interestingly, this item discusses the need to provide incentives for financing to increase minority ownership. I applaud this goal, but find it difficult to understand fully how this can be a goal of the Commission in light of our action with respect to the radio ownership docket. I would urge commenting parties to explain how these actions taken together will encourage the growth of minority ownership.

STATEMENT OF
COMMISSIONER ERVIN S. DUGGAN

In the Matter of Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry

Access to capital is the single greatest barrier to entry in the broadcasting field today. Commercial markets for broadcast loans have virtually gone dry in the last 12 months, and I believe it is right for us to consider possible actions by the Commission to ease this credit crunch. I will be particularly interested in comments on the proposals we make for increasing capital for minority investment in broadcasting.

I approach the concept of granting a security interest in a broadcast license with cold skepticism. Those who believe adopting such a policy would spur broadcast lending or provide any other benefits to the broadcasting community bear, in my judgment, a heavy burden in proving their case. I see no harm in expanding the record on this issue, but I believe at the outset that both the security interest idea and the "right of reverter" concept raise serious and perhaps insurmountable concerns.

Before the
Federal Communications Commission
Washington, D.C. 20554

GC Docket No. 92-52

In the Matter of

Reexamination of the Policy	RM-7739
Statement on Comparative	RM-7740
Broadcast Hearings	RM-7741

NOTICE OF PROPOSED RULE MAKING

Adopted: March 12, 1992; Released: April 10, 1992

Comment Date: May 26, 1992
Reply Date: June 15, 1992

By the Commission: Commissioner Duggan issuing a statement.

I. INTRODUCTION

1. In this notice, we invite commenters to address the efficacy of the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (*1965 Policy Statement*), which detailed the criteria to be used to select among competing applicants for new broadcast facilities, and we request comment on certain proposals to revise the comparative process to remedy any perceived shortcomings of the existing system. We expect that adoption of a revised system could produce swifter, more certain choices among applicants for new broadcast facilities, while preserving the real public interest benefits of making such choices.

2. The criteria used to select among mutually exclusive applicants for new broadcast facilities have not been comprehensively reviewed for nearly 27 years. Their continued unexamined use after this time interval poses a series of problems for the Commission because broadcasting has continuously evolved during this period. Given the passage of time and the dramatic changes that have occurred in the broadcast marketplace, in broadcast technology, and in the Commission's regulatory policies for broadcasting, a reexamination of the comparative criteria is eminently warranted. Moreover, our experience with some of these criteria over time raises questions of whether these criteria have become too subjective and imprecise to be used effectively in the public interest. Comparative hearings, in which these criteria are applied, tend to be protracted and have often turned on relatively slight distinctions among the applicants. The difficulties with this process are exacerbated by the possibility that the comparative criteria may unduly lend themselves to manipulation by the applicants.

3. The shortcomings of the comparative hearing process have frequently inspired criticism. Recently, for example, commenters in our proceeding adopting procedural reforms to expedite the hearing process urged the Commission to revise the current comparative criteria. *Proposals to Reform the Commission's Comparative Hearing Process*, 6 FCC Rcd 3403, 3406 ¶ 26 (1991). Similarly, there was general agreement among the expert panelists at the FCC Adjudicatory Practice Conference, "Making the Adjudicatory Process Work", held June 14, 1991 that the Commission's comparative policy should be reexamined and revised. *See FCC Adjudicatory Practice Conference June 14, 1991* (videotape), on file in the Audio Visual Management Office, Office of Managing Director, FCC. *See generally* Anthony, *Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings*, 24 Stan. L. Rev. 1 (1971).

4. The Commission has full authority under the Communications Act to review its regulations to consider whether they continue to serve the public interest. Indeed, it is obligated to do so. As the Supreme Court has noted:

> If time and changing circumstances reveal that the "public interest" is not served by application of the [existing] Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations [and change them].

NBC v. US, 319 U.S. 190, 225 (1943). *See also FCC v. WNCN Listeners Guild*, 450 U.S. 582, 603 (1981); *ACLU v. FCC*, 823 F.2d 1554, 1565 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1220 (1988). In this regard, the United States Court of Appeals for the District of Columbia Circuit, in *Bechtel v. FCC*, No. 91-1112 (D.C. Cir. 1992), commented pointedly on the Commission's continued use of the comparative criteria in the face of criticism. The court stated that the Commission had: "a duty to reexamine its policies over time to ascertain whether they work -- that is, whether they actually produce the benefits the Commission originally predicted they would." Slip Op. at 15-16. In particular, the court noted that: "changes in factual or legal circumstances may impose upon the agency an obligation to reconsider a settled policy or explain its failure to do so." *Id.* at 15. We agree that the time for reexamining our comparative criteria is overdue. We undertake that reexamination in this proceeding.[1]

II. BACKGROUND

5. Currently, the Commission resolves comparative hearings using criteria set forth in the *1965 Policy Statement*. Although the Commission has clarified and modified these criteria on an *ad hoc* basis from time to time,[2] there has been no comprehensive review of these criteria since they were adopted nearly three decades ago. Moreover, although the *1965 Policy Statement* reflected years of experience adjudicating comparative proceedings, the Commission did not conduct a formal Rule Making or receive public comment in formulating its policy.

6. The *1965 Policy Statement* defines two primary objectives of the comparative licensing process: (1) maximum diffusion of control of the media of mass communications; and (2) best practicable service to the public. To achieve these objectives, the *1965 Policy Statement* sets out seven criteria for comparing competing applicants. These are: (1) diversification of control of the media of mass communications; (2) integration of ownership into management; (3) proposed program service; (4) past broadcast record; (5) efficient use of the frequency; (6) character; [3] and (7) other factors. In an addendum to the *1965 Policy Statement*, the Commission added the use of auxiliary power equipment as a comparative factor. *Comparative Broadcast Hearings*, 2 FCC 2d 667 (1966).

7. Under the current system, other factors are deemed to enhance the quantitative credit due for integration. These are: local residence and past participation in civic affairs; minority ownership; daytimer status; female ownership; and past broadcast experience.[4]

8. Within each criterion, the differences between the applicants are characterized by a system of preferences and demerits. These are described by various adjectives, such as "slight," "moderate," "substantial," and "strong." Once this comparison is completed within each criterion, all of the preferences across all of the criteria are considered in terms of their number and magnitude, and the relative importance of each criterion. *See, e.g., Greater Wichita Telecasting, Inc.*, 96 FCC 2d 984 (1984); *Alexander S. Klein, Jr.*, 86 FCC 2d 423 (1981).

III. DISCUSSION

9. In light of changes in Commission policy, the realities of the broadcast industry, and the current state of broadcast technology, we question whether use of the existing criteria continues to result in selection of the applicant that will best serve the public interest. Moreover, comparative hearings using these criteria often appear to become bogged down in litigating subjective or trivial distinctions and the criteria themselves may invite manipulation by the applicants. Thus, there is a question whether these proceedings delay the initiation of new service to the public and also a question whether the applicant chosen will in fact best serve the public interest.[5]

10. We therefore propose to consider the following modifications of the comparative process. First, we will consider whether to retain, eliminate, or modify four criteria. Three of these criteria -- integration, proposed program service, and past broadcast record -- seek to predict the quality of future broadcast service. We seek comment on whether these assumptions continue to be valid. A fourth criterion -- auxiliary power -- also seems open to question. In addition, we seek comment on whether to add new criteria to help us select the most qualified applicant. Specifically, we will consider whether to use a new criterion called a "service continuity preference", designed to enhance the public interest in the comparative process by encouraging comparative applicants to retain the stations they are attempting to secure through the comparative hearing for a certain period of time. We also wish to explore the possibility of instituting a "finder's preference" for applicants successfully petitioning for a new allotment of a frequency. And we ask interested parties to propose other new criteria for our consideration.

11. Second, we will consider whether to modify the manner in which the resulting criteria are evaluated. Specifically, we believe that a point system may provide a basis for evaluating applicants that is more objective and rational than current practice. Use of such a system may expedite adjudication and provide results that are more certain and defensible. The point system contemplated involves: (1) defining the weight of each preference in terms of an absolute number of "points", rather than in terms of relative adjectival preferences and demerits; (2) precisely defining the circumstances under which points are awarded under each criterion; and (3) providing a "tie-breaker" procedure for resolving cases in which no applicant receives a dispositive preference under the comparative criteria.

12. Although such proposals would substantially change the comparative selection process, we believe they can be fully reconciled with the "full hearing" requirement of 47 U.S.C. § 309(e). *See also Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). For the reasons discussed in detail at paragraph 24, *infra*, we also believe that our action here is fully consistent with the Congressional prohibition on reexamining our minority and gender preference policies.[6]

A. REEXAMINATION OF CERTAIN FACTORS

13. We reaffirm the goal of the *1965 Policy Statement* that we should seek to grant applications that will provide the best practicable service to the public. Indeed, this policy remains integral to Commission regulation generally. Nonetheless, in light of changing circumstances, we have over the years reevaluated how this goal may best be achieved. The nature of broadcast regulation has changed significantly since 1965, raising the question of whether some of the criteria in the *1965 Policy Statement* may no longer be consonant with our regulatory approach. We stress that we do not depart from our conviction that licensees must serve community needs. Rather, we seek comment on whether the criteria set forth in the *1965 Policy Statement* provide a realistic basis for predicting whether one applicant will better serve community needs than other applicants.

14. *Integration*. The *1965 Policy Statement* presumed that an owner integrated into the day-to-day management of the station would "inherently" provide better service than a nonintegrated owner by linking legal responsibility and day-to-day performance and by being more sensitive to local community needs. 1 FCC 2d at 395. While these assumptions are not unreasonable, current circumstances warrant inquiry as to their validity in practice. For example, the highly competitive nature of today's broadcast market and the professionalism of today's broadcast operations suggest that an integrated owner might not necessarily provide a more responsive service than would a nonintegrated owner. The court, in *Bechtel*, expressed a similar view: "The Commission has not spelled out *why* an owner/manager will be more sensitive to community needs than an owner who hires a professional manager". Slip Op. at 12. (Emphasis in the original.) Thus, the court concluded: "the Commission must demonstrate why its focus on integration is still in the public interest, if indeed the Commission concludes that it is." Slip Op. at 16.

15. Moreover, the integration criterion provides an incentive for applicants to fashion proposals which may not realistically be effectuated -- what the court, in *Bechtel*, referred to as "'strange and unnatural' business arrangements." Slip Op. at 14. Examination of potentially unreliable proposals can be a time-consuming and uncertain process. *See Evergreen Broadcasting Co.*, 6 FCC Rcd 5599, 5600-01 ¶ 12 (1991); *Royce International Broadcasting*, 5 FCC Rcd 7063, 7063-64 ¶¶ 4-10 (1990), *recon. denied*, 6 FCC Rcd 2601 (1991). *Accord, Metroplex Communications, Inc.*, 5 FCC Rcd 5610, 5611-12 ¶¶ 11-21 (1990) (applicant's integration proposal rejected after consideration at length). Indeed, in one particularly egregious case, we found that an applicant's integration proposal constituted misrepresentation and lack of candor before the Commission. *Mid-Ohio Communications, Inc.*, 5 FCC Rcd 940 (1990), *recon. denied*, 5 FCC Rcd 4596 (1990). We therefore seek comment as to whether the integration criterion should be retained or modified and, if so, what

rationale or empirical evidence supports such action. We also seek comment on whether credit should be granted as well for the use of professional management and, if so, whether some lesser weight should be given to it.

16. *Proposed program service.* Although the *1965 Policy Statement* reflects a determination that most distinctions in programming proposals have no significance in the comparative evaluation, it holds out the possibility that some differences may reflect a superior devotion to public service. 1 FCC 2d at 397. We have suggested, for example, that applicants may be able to demonstrate that they have devoted substantially greater time, effort, and resources to meeting ascertained community needs than other applicants. In such situations, where an applicant can show an unusual attention to local community matters for which there is a demonstrated community need, a preference would be awarded. *Chapman Radio & Television Co.*, 7 FCC 2d 213, 214-15 ¶ 5 (1967). Assuring to the greatest extent possible that applicants will serve the special needs and interests of their communities remains a touchstone of Commission regulation of broadcasting.

17. At the same time, however, evaluating program service proposals in the comparative licensing process may be difficult. For example, in renewal cases we have been skeptical of the probative value of "paper proposals." *See, e.g., Cowles Broadcasting, Inc.*, 86 FCC 2d 993, 1013 ¶ 62 (1981), *aff'd sub nom. Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 103 S.Ct. 1774 (1983). Moreover, examination of program proposals in comparative proceedings raises questions with regard to the policy expressed in the radio and television deregulation proceedings, in which we found that the nature of today's broadcasting marketplace militates against *a priori* judgments about program content. *Deregulation of Radio*, 84 FCC 2d 968, 982-83 ¶ 34 (1981), *aff'd in part and remanded in part sub nom. Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983); *Commercial TV Stations*, 98 FCC 2d 1076, 1076-77 ¶ 2, 1080 ¶ 8, 1087-88 ¶ 23 (1984), *aff'd in part and remanded in part sub nom. Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987). Further questions are raised by the fact that litigation of proposed programming questions is often complex and seldom dispositive. *See, e.g., Religious Broadcasting Network*, 3 FCC Rcd 4085, 4102-03 ¶¶ 57-60 (Rev. Bd. 1988). We therefore ask commenters to address whether the benefits of retaining the proposed program service criterion outweighs the detriments and, if so, how the preference could be more workably administered.

18. *Past broadcast record.* As in the case of proposed programming, the *1965 Policy Statement* reflects a determination that most differences in applicants' past broadcast records are insignificant. 1 FCC 2d at 398. The *1965 Policy Statement* does suggest, however, that some records reflecting an applicant's past ownership and participation may be "unusually good" or "unusually poor" and should therefore be considered as part of the comparative process. We believe that past behavior may, in some circumstances, serve as a predictor of future conduct. At the same time, we recognize that this may not always be the case and that, as in the case of proposed programming issues, litigation concerning past broadcast record tends to be complex and dispositive only in extraordinary cases. *See, e.g., Knoxville Broadcasting Corp.*, 103 FCC 2d 669, 689-96 ¶¶ 24-33 (Rev. Bd. 1986). We thus ask commenters to address the desirability of retaining past broadcast record as a comparative criterion.[7] In particular, commenters are invited to address the validity of this criterion and whether there may be more objective means of structuring it to avoid overly subjective and burdensome litigation.

19. *Auxiliary power.* The Commission adopted the auxiliary power preference in response to the November 1965 northeastern power failure. 2 FCC 2d at 667. By giving comparative credit to applicants proposing to use auxiliary power equipment (*i.e.*, a generator that would provide backup power in the event of a power failure), we hoped to encourage stations to have this capability in case of a similar power outage. Upon reflection, we question the suitability of the comparative process for addressing this concern. Auxiliary power is obviously desirable and readily implemented. If we were concerned that broadcasters were not voluntarily integrating auxiliary power capabilities into their operations, we might consider regulatory intervention with respect to the industry as a whole. We question, however, the rationale for focusing any concern in this regard only on those stations that happen to be involved in a comparative hearing. We thus invite commenters to address whether the auxiliary power criterion should be retained or eliminated.

B. TREATMENT OF OTHER FACTORS

20. Notwithstanding the questions raised above, we continue to believe that the comparative process can promote substantial public interest goals. We will therefore seek comment on the future use of the other current comparative factors as well as the new "service continuity preference" and "finder's preference" proposed in this notice.

21. *Diversification.* The diversification factor reflects the Commission's traditional goal of seeking to promote diversity of viewpoints and to prevent undue concentration of economic power. *See FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 780 (1978). Congress has demonstrated the same concern by making this factor relevant in lotteries conducted pursuant to 47 U.S.C. § 309(i). On the other hand, the Commission has recognized in other contexts that permitting at least some degree of co-ownership among radio and television stations can better promote program diversity than maximized separate ownership would. *See Amendment of Section 73.3555*, 100 FCC 2d 17 (1984). The Commission is now considering whether allowing an increased degree of co-ownership would be sound public policy given the current state of the broadcast marketplace. *See Revision of Radio Rules and Policies*, FCC 92-97 (adopted Mar. 12, 1992); *Review of the Policy Implications of the Changing Video Marketplace*, 6 FCC Rcd 4961 (1991). In light of these findings, it is appropriate to inquire whether we should alter the current way in which we comparatively consider diversification. For example, it may be that the diversification factor should not automatically receive the same weight in all cases, regardless of community size and the number of media voices. Also, if we decide to use a point system, for example, it may be more consistent with our substantive approach to joint ownership to award points to applicants who do not own other broadcast properties but not to subtract various numbers of points from those who do own one or more properties. Accordingly, we seek comment on how diversification should be weighed as a preference factor in a reformed comparative selection process.

22. *Minority and Gender Preferences.* Minority preferences in comparative broadcast proceedings represent one aspect of our attempt, endorsed by Congress, to remedy the effect of past racial and ethnic discrimination and to promote programming diversity. *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3009-10 (1990). *See also Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979 (1978). The policy responds to the recommendation that:

> Unless minorities are encouraged to enter the commercial broadcasting business, a substantial portion of our citizenry will remain underserved and the larger, non-minority audience will be deprived of the views of minorities. . . .

FCC Minority Ownership Task Force, Report on Minority Ownership in Broadcasting (1978) at 1. Congress has demonstrated the same concern by making this factor relevant in lotteries conducted pursuant to 47 U.S.C. § 309(i). The gender preference serves similar goals with respect to women.[8] Currently, we treat minority and female ownership as factors enhancing an applicant's integration credit. However, because we may eliminate integration as a comparative factor, we propose to consider how minority and female ownership should be treated as separate factors[9] pursuant to a revised system of comparative selection.[10] Additionally, we seek comment on whether minorities should have to have a minimum degree of equity for applicants to receive minority credit to prevent abuse of the policy. Those answering this question in the affirmative are also asked to address the further issue of whether Commission implementation of such a policy would be legally sustainable in light of Congress' express intent that no "retroactive [ ] . . . changes" be made to the current minority preference system. *See* paragraph 23, *infra*.

23. We stress that in proposing to treat minority and female ownership as separate comparative factors it is not our intention to change the proportionate weight currently given these factors in the comparative evaluation, and any change made to the comparative criteria as a consequence of this notice will preserve these factors' current relative weighting. For this reason, we believe that our proposal to treat minority and female ownership as separate comparative factors can be reconciled with Congressional enactments intending to prohibit the Commission from eliminating or diluting these preferences, originally adopted in 1987 and most recently reenacted by Act of October 28, 1991, Pub. L. 102-140. In these appropriation measures, Congress provided:

> That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing . . . to expand minority and women ownership of broadcasting licenses . . .

See also Reexamination of the Commission's Comparative Licensing, 3 FCC Rcd 766 (1988) (terminating a proceeding designated to reexamine the various Commission minority and gender policies). *Accord*, 47 U.S.C. § 309(i).

24. Although an expansive reading of this language might be taken to preclude any change in the comparative process, we believe that our proposed action fully comports with Congress' directive. In our view, this measure is intended as a prohibition on Commission action to repeal or weaken policies designed to expand minority and female ownership. Our proposal herein, however, is not designed either to eliminate or reduce the comparative credit now awarded for minority and female ownership. Rather, under our proposed system of comparative selection, we intend that minorities and women would continue to receive the same proportional credit as under the current system. The sole change would be that the minority or female owner would no longer need to be integrated in station management to receive comparative credit. Not only would this make it easier for qualified individuals to claim credit, it would also conform the comparative treatment of minority ownership to the administration of our tax certificate and distress sale policies, in which integration is not a prerequisite. We thus believe that our proposed approach would be consistent with the directive of Congress.

25. *Local residence.* The Commission traditionally has enhanced an applicant's integration credit for past or proposed local residence and civic participation to take into account the applicant's continuing familiarity with local interests and needs. 1 FCC 2d at 396. It may be that if integration of ownership into management is no longer found to be worthy of retention as a comparative criterion, local residence of the owner may take on even greater importance to ensure a degree of contact and familiarity with the service area. Conversely, as the court suggested in *Bechtel*, professional management, so prevalent in broadcast operations today, may vitiate the continued relevance of local residence. Slip Op. at 12. We therefore seek comment on this issue. As in the case of minority and female preferences, abolition of the integration criterion would mean that we would in the future treat local residence as a separate comparative factor.

26. *Efficient use of the frequency.* Under this criterion, we have awarded preferences to applicants proposing greater coverage than their opponents, especially coverage to areas receiving no or only one existing service. *See, e.g., Capital City Community Interests, Inc.*, 2 FCC Rcd 1984, 1990 ¶ 33 (Rev. Bd. 1987). This practice represents one aspect of the Commission's role in ensuring "a fair, efficient, and equitable distribution of radio service." *See Apogee, Inc.*, 59 RR 2d 941, 945 n.16 (1986). We propose to continue awarding credit for efficient use of the frequency. We invite commenters to propose objective criteria -- as to area, population, number of other services, etc. -- by which the Commission can judge whether a given applicant is entitled to credit on this point. Moreover, we also invite commenters to propose novel indicia -- other than the traditional comparative coverage analysis -- by which efficent use of the frequency can be recognized.

27. *Daytimer preference.* We currently award enhancement credit in FM radio proceedings to the operators of existing daytime-only AM stations in response to the disadvantages that daytimers have historically faced. *FM Broadcasting Assignments*, 101 FCC 2d 638, 643 ¶ 14, 645-46 ¶ 20 (1985). Although we have made substantial efforts to alleviate the problems of the AM service, we recognize that disadvantages still remain.[11] Moreover, we found that " . . . there is an especially strong likelihood

that [daytimers] will operate a full-time FM facility in the same community in a manner which furthers the public interest." 101 FCC 2d at 645 ¶ 20. We therefore propose that daytimer credit should be part of a revised comparative selection system for FM facilities. As in the case of the minority preference, the daytimer preference would have to be revised to be a separate criterion if integration were eliminated as a comparative factor.

28. *Service continuity preference.* Additionally, we propose a new criterion to be included in the comparative evaluation. We propose to award credit to applicants committing themselves to own and operate the station for at least three years.[12] In proposing this factor, we intend to extend the public interest benefits of choosing licensees in the comparative process, to discourage potential abuse of the comparative process, and to prevent disruption of service. We thereby acknowledge the observation of the Court of Appeals that rapid transfer of a station awarded after a comparative selection appears to "eviscerate" the rationale of the comparative process. *Bechtel*, Slip Op. at 13. We propose to enforce the applicant's representation that it will hold the station for at least three years by approving premature sales of the station only at a distress sale price to a minority buyer.[13] *Cf. Lee Broadcasting Corp.*, 76 FCC 2d 462, 463 ¶ 2 (1980) (explaining the Commission's minority distress sale policy). We also expect to review any application to sell prematurely to determine whether the applicant had misrepresented its intention to operate for three years.

29. *Finder's preference.* The Commission has before it petitions proposing that we award comparative preferences to those applicants who successfully request the allotment of new broadcast frequencies through Rule Making.[14] These petitioners contend that the public interest would be served by recognizing that such finders have taken the initiative in and undertaken the burden of introducing a new service to the community. This rationale for such a preference is somewhat analogous to that of the "pioneer's preference" we award to those seeking the development of new communications services and technologies. *Establishment of Procedures*, 6 FCC Rcd 3488 (1991). In addition, petitioners suggest that a finder's preference would help "facilitate the award of licenses to minorities, women, and other newcomers." Ex Parte Presentation by counsel for Jeffrey Rochlis in Gen. Docket No. 90-264 (Apr. 29, 1991). Specifically, petitioners point to various comparative proceedings in which minority applicants would have prevailed, or the comparative process would have been less protracted and costly, if a finder's preference had been in place. *See, e.g., Dunlin Group*, DA 90-1090 (MMB Sept. 10, 1990); *Hubbard Broadcasting, Inc.*, DA 91-374 (MMB Apr. 17, 1991). *See* Rochlis Response to Comments in RM Nos. 7740 and 7741 (Aug. 8, 1991) at 7-13. We believe there may be merit to this proposal and seek further comment on it. Because the finder's preference would be one of several comparative criteria used to select among competing applicants, we request comment on the weight that should be accorded in the comparative process.

30. *Additional criteria.* We recognize that changes in broadcast technology and the broadcast marketplace may suggest new comparative criteria that we have not anticipated in this notice. We invite commenters to propose such additional criteria.

C. AN OBJECTIVE AND RATIONAL SYSTEM OF PREFERENCES

31. To achieve the public interest benefits of the comparative process in an efficient manner, we will consider whether to adopt a new system for evaluating the comparative criteria. This system would be designed to clarify and expedite the evaluation of competing applicants while preserving the relative weighting that the retained criteria receive under the present subjective approach. It would also seek to avoid frivolous litigation over trivial differences among the applicants under the criteria, which has been a continuing problem with the present system.

32. Under the proposed system, an applicant would receive a specified number of points based on its attributes under each comparative criterion.[15] For example, under minority ownership, an applicant might receive +3 points for controlling minority ownership and +2 points for attributable ownership. Under diversification, an applicant with no attributable outside media interests might receive +3 points. We stress that the examples given are merely illustrative of point values that might be assigned. We invite commenters to propose appropriate point values for the various criteria.

33. The number of points that an applicant receives under each criterion would reflect: (1) the public interest significance of the criterion itself -- for example, the greater intrinsic weight of minority ownership as compared with female ownership, and (2) the applicant's strength in relation to that criterion – for example, an attributable interest rather than a controlling interest. The system therefore could be used to express the public interest benefits of a particular applicant in clear, measurable terms. Furthermore, because the point values would not change with every minor variation in the applicant's attributes, such a system could be used to distinguish between differences that have public interest significance and those that are *de minimis*.

34. The winner in a proceeding would be determined by adding up the total number of points to which each applicant is entitled. The applicant receiving the highest number of total points would be granted the permit. The total points that an applicant receives would reflect the overall public interest in granting its application, and comparing the point total of different applicants would provide an objective and rational basis to evaluate the public interest in granting one over the other.

35. Under the proposed system, cases may arise in which two or more applicants each share the highest number of total points in a particular proceeding. We believe that such a result is justifiable. It does not necessarily hold that any difference between applicants -- even the most miniscule or subjective -- necessarily has public interest significance. Thus, two or more applicants may rationally be deemed equivalent from a public interest standpoint. In this eventuality, such cases could be decided by means of a "tie-breaker" procedure. A tie-breaker procedure that is fair, objective, and known in advance is fully consistent with the parties' due process rights and the public interest. *See Lottery Selection Among Applicants*, 57 RR 2d 427, 431 ¶¶ 15-17 (1984), *aff'd sub nom. National Latino Media Coalition v. FCC*, *reported at* 62 RR 2d 1552 (D.C. Cir. 1987); *Amendment of Part 74*, 101 FCC 2d at 67 ¶ 42.

36. In this regard, we propose three possible tie-breakers. In a tie situation, we might grant the application of the applicant first filing for the facility in question. Such a tie-breaker would recognize that this applicant has taken

the initiative in developing a proposal for a particular facility, and would thereby encourage the efficient use of the spectrum. *Cf. FM Application Processing*, 58 RR 2d 776, 785 ¶ 33 (1985), *recon. denied*, 59 RR 2d 100 (1985). Another possibility would be to use substantial broadcast experience as a tie-breaker under the theory that, all else being equal, an experienced broadcaster may be more efficient in bringing new service to the public than a novice. *Cf. Global Broadcasting Group, Inc.*, 94 FCC 2d 809, 812-13 ¶ 7 (1983). In this regard, however, we ask commenters to specifically address whether the use of broadcast experience as a tie-breaker would disadvantage women and minorities. A third possibility would be to choose the winning applicant randomly.[16] We invite comment on the use of these criteria as tie-breakers, as well as on any other possible tie-breakers.

37. Although the foregoing proposal represents a significant departure from current practice, we believe our statutory authority is broad enough to encompass use of the proposed system. We recognize that under 47 U.S.C. § 309(e), mutually exclusive applicants for broadcast facilities are entitled to a "full hearing" as to whether their applications should be granted. *See also Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). We also recognize that the full hearing required has traditionally been interpreted in terms of the exhaustive inquiry we now conduct. *See Johnston Broadcasting Co. v. FCC*, 175 F.2d 351 (D.C. Cir. 1949). We do not, however, believe that the full hearing requirement necessarily precludes adoption of the proposed point system.

38. As the Supreme Court explained in *U.S. v. Storer Broadcasting Co.*, 351 U.S. 192, 202-03 (1956), the hearing requirement does not withdraw from the Commission the Rule Making authority necessary for the orderly conduct of its business. Thus, the Commission need not hold a hearing as to questions that have already been determinined in a Rule Making where no substantial and material factual questions remain unresolved. Because telecommunications is a rapidly developing field, Congress has given the Commission broad powers of regulation. We anticipate that our experience and the record to be compiled in this proceeding will give us a sound basis to limit and clarify the selection process. We note, moreover, that the point system we employ for ITFS (which is also subject to the requirements of 47 U.S.C. § 309(e)) has been before the United States Court of Appeals for the District of Columbia Circuit. The court accepted the validity of the point system without comment, describing it as "a modified comparative hearing system." *Telecommunications Research and Action Center v. FCC*, 836 F.2d at 1356. We emphasize that use of the point system would not preempt consideration of any substantial and material questions that may appear on a particular record. Applicants would still be able to challenge their competitors' basic qualifications and their competitors' entitlement to the comparative credit claimed pursuant to the procedures provided for under 47 U.S.C. §§ 309(d)(1), (d)(2), and (e). We invite commenters to address the validity and desirability of the proposed point system or any alternatives and whether use of such a system would reduce the length and complexity of comparative hearings.

D. NONCOMMERCIAL STATIONS

39. Under current practice, applicants for noncommercial stations are not compared using the same criteria as those used for commercial applicants. Instead, noncommercial applicants are evaluated as to the extent to which each of the proposed operations will be "integrated into the overall operations and objectives" of the respective applicants. *New York University*, 10 RR 2d 215, 217-18 ¶¶ 8-9 (1967). Upon reflection, it appears that use of such a vague standard may make rational choices among noncommercial applicants difficult, if not impossible. We note, for example, that the Review Board, for this very reason, recently urged the Commission to reexamine the comparative analysis to be applied in these cases. *Real Life Educational Foundation of Baton Rouge, Inc.*, 6 FCC Rcd 2577, 2580 n. 8 (Rev. Bd. 1991), *application for review pending*.

40. We tentatively conclude that the vague standard set forth above should be eliminated. Rather, we will consider whether to use a modified version of the point system, including a tie-breaker, that we propose for commercial applicants. We also invite commenters to address whether the criteria used to select commercial applicants are relevant in noncommercial proceedings and whether we should use different or additional criteria. We also seek comment on whether a different comparative approach should be followed for state-owned public broadcasters as opposed to other noncommercial applicants.

E. APPLICABILITY

41. We propose to apply the revised criteria to all applicants not in hearing as of the effective date of our action in this proceeding.[17] By promptly implementing the revised system, we anticipate that the public will immediately receive the benefits of adjudications that are more rapid and certain than under the present system and less costly. In limiting the applicability of the revised criteria to applications not yet in hearing, we seek to avoid prejudice resulting from the detrimental reliance on the current comparative system by applicants that have already paid the hearing fee or incurred other expenses associated with the hearing process. We believe that designation for hearing represents a reasonable cut-off in this regard. Nonetheless, we note that an agency may change its rules prospectively, and that a party has no vested right in the application of the former rules, although it may have proceeded on the assumption that the former rules would remain in force. *See Multi-State Communications, Inc. v. FCC*, 728 F.2d 1519, 1525-26 (D.C. Cir. 1984), *citing, FHA v. Darlington, Inc.*, 358 U.S. 84, 91 (1958). We would anticipate giving applicants affected by the new criteria an opportunity to amend their applications to conform to the new criteria. We seek comment on the desirability of applying the revised criteria in this manner.

F. QUESTIONS FOR COMMENT

42. In view of the foregoing, we seek comment on the following issues:

(a) Whether and to what extent the *1965 Policy Statement* has produced the public interest benefits intended by the Commission.

(b) Whether integration, proposed program service, past broadcast record, and auxiliary power should be retained, modified, or eliminated.

(c) Whether the Commission should award credit, similar to, but less than, that for integration, for the use of professional management.

(d) Whether and to what extent comparative credit should be given for the remaining factors currently used as comparative criteria as well as for a new "service continuity preference," "finder's preference," or other novel comparative criteria. With respect to the service continuity preference, whether exceptions should be made to the restrictions on the transfer of stations where such a preference has been claimed, and whether a holding requirement should be imposed on all licensees selected through the comparative hearing process.

(e) Whether the award of credit for minority ownership should depend on minorities owning a minimum level of equity in the applicant.

(f) Whether the proposed point system should be adopted and, if so, what point values should be assigned to the various criteria under the system.

(g) Whether the proposed or other tie-breaker procedures should be adopted; whether the use of broadcast experience as a tie-breaker would disadvantage women and minorities; and whether any lottery used as a tie-breaker must be weighted consistent with 47 U.S.C. § 309(i).

(h) Whether the Commission should modify or repeal its policy regarding the use of limited partnerships and two-tiered corporations set forth in *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 488 ¶ 15 (1981), for example, by requiring active owners to have a minimum investment or equity interest in the applicant.

(i) whether the Commission has the authority to adopt the proposed modified comparative criteria in light of the full hearing requirement of 47 U.S.C. § 309(e) and whether adoption of revised criteria would reduce the length and complexity of comparative hearings.

(j) whether the proposed modified comparative criteria are consistent with the limitation on the reexamination of minority and gender preferences imposed by Congress.

(k) Whether a form of the proposed point system should be applied to noncommercial applicants and, if so, what comparative factors should be considered and how should state-owned public broadcasters be treated vis-a-vis other noncommercial applicants.

(l) Whether and to what extent the proposed modifications of the comparative process should be applied to pending commercial and noncommercial applicants that have not been designated for hearing.

(m) Whether there are alternatives to the proposed modified comparative criteria to reform the current comparative process that would better serve the public interest.

(n) What impact adoption of the proposed modified comparative criteria should have on comparative renewal proceedings.

IV. PROCEDURAL MATTERS

A. Ex Parte Rules -- Non-restricted Proceeding

43. This is a non-restricted notice and comment Rule Making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission rules.

B. Regulatory Flexibility Act

44. An Initial Regulatory Flexibility Analysis is contained in the Appendix to this notice.

C. Authority

45. Authority for this Rule Making action is contained in 47 U.S.C. §§ 154(i), 154(j), 303(r), 309(g), 309(i), 403.

V. ORDERING CLAUSES

46. ACCORDINGLY, IT IS ORDERED, That NOTICE IS HEREBY GIVEN of the proposed regulatory changes described above, and that COMMENT IS SOUGHT on these proposals.

47. IT IS FURTHER ORDERED, That pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's Rules, comments SHALL BE FILED on or before **May 26, 1992** and reply comments SHALL BE FILED on or before **June 15, 1992** thereafter. To file formally in this proceeding, commenters must file an original and four copies of all comments, reply comments, and supporting comments. If commenters want each Commissioner to receive a personal copy of their comments, they must file an original plus nine copies. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition, commenters should file a copy of any such pleadings with the Office of General Counsel, Room 610, 1919 M Street, N.W., Washington, D.C. 20554. Commenters should also file one copy of any documents filed in this docket with the Commission's copy contractor, The Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

48. For further information, contact David S. Senzel, (202) 632-7220, Office of General Counsel.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS

Reason for Action

The Commission has determined that the comparative hearing process, which is currently used to select from among competing applicants for new broadcast facilities, is potentially out of date.

Objective

The Commission seeks to adopt a simplified hearing process to select new broadcast licensees on an expedited and more rational basis.

Legal Basis

Action is being taken pursuant to 47 U.S.C. §§ 154(i) and (j), 303(r), 309(g) and (i), and 403.

Reporting, Record Keeping and Other Compliance Requirements

This proposed would reduce such requirements by eliminating and simplifying litigation involved in prosecuting a contested application for a new broadcast facility.

Federal Rules which Overlap, Duplicate or Conflict with the Proposed Rules

None.

Description, Potential Impact, and Number of Small Entities Affected

This proposal would benefit all entities seeking a license for a new broadcast facility by reducing the administrative burdens associated with the comparative hearing process.

Any Significant Alternative Minimizing Impact on Small Entities and Consistent with the Stated Objections

None.

FOOTNOTES

[1] In this proceeding, we will attempt a comprehensive review of issues regarding the criteria used in comparative proceedings for new broadcast facilities. We will not address the distinct issues raised in comparative renewal proceedings, where a new applicant challenges the renewal of an incumbent licensee. Comparative renewal proceedings are the subject of an unresolved inquiry in another docket. *See Formulation of Rules and Policies Relating to Broadcast Renewal Applicants*, 4 FCC Rcd 4780 (1989); 3 FCC Rcd 5179 (1988). Comparative renewal proceedings differ from new applicant proceedings because of the great importance in comparative renewal proceedings given to whether the incumbent has earned a "renewal expectancy" based on its past broadcast record. *See* 3 FCC Rcd at 5180 ¶¶ 3-5. Nonetheless, in comparative renewal proceedings where the incumbent has not earned a renewal expectancy, the applicants are compared as if they were all new applicants. *WIOO, Inc.*, 95 FCC 2d 974, 991-92 ¶ 42 (1983). Under those circumstances, it would be appropriate to use the criteria developed in this proceeding. We seek comment on the implications for comparative renewal proceedings of the revisions adopted in this proceeding.

[2] *See, e.g., WPIX, Inc.*, 68 FCC 2d 381, 411-12 ¶¶ 85-88 (1978) (taking into account credit for minority ownership pursuant to *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974)); *Mid-Florida Television Corp.*, 69 FCC 2d 607, 652 ¶ 95 (Rev. Bd. 1978), *set aside on other grounds*, 87 FCC 2d 203 (taking into account credit for female ownership); *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 488 ¶ 15 (1981) (clarifying the treatment of limited partners and nonvoting stockholders in the comparative analysis); *Ruarch Associates*, 103 FCC 2d 1178, 1180-81 ¶ 5 (1986) (ruling on the enforceability of divestiture commitments made in comparative proceedings), *modified in Reform of the Commission's Comparative Hearing Process*, 6 FCC Rcd 157, 160 ¶ 21 (1990); *FM Broadcasting Assignments*, 101 FCC 2d 638, 645-47 ¶¶ 20-23 (1985), *aff'd sub nom. National Black Media Coalition v. FCC*, 822 F.2d 277 (2d Cir. 1987) (adoption of credit for daytime-only licensees who apply for new FM channels). *See also* note 3, *infra*.

[3] The Commission subsequently eliminated character as a comparative factor and now treats it only as a basic qualifications issue. *Character Qualifications*, 102 FCC 2d 1179, 1231-32 ¶¶ 111-13 (1986), *recon. denied*, 1 FCC Rcd 421 (1986).

[4] *See* note 1, *supra*, for the actions adding these criteria to the comparative analysis.

[5] We need not discuss our concerns in this regard at length. They are not new, and we have closely examined them in earlier attempts to remedy the flaws of the comparative process. *See Proposals to Reform the Comparative Hearing Process*, 5 FCC Rcd 4050 (1990) (proposing expedited hearing procedures); *Amendment of Section 73.3525 of the Commission's Rules*, 5 FCC Rcd 3921 (1990) (proposing measures to discourage the filing of abusive applications); *Amendment of the Commission's Rules*, 4 FCC Rcd 2256 (1989) (proposing elimination of the comparative hearing process in favor of a lottery). While the records compiled in these earlier proceedings amply demonstrated the flaws in the existing system, they did not result in reform of the comparative criteria themselves. In particular, we concluded that replacing use of these criteria with a lottery was not warranted. *Amendment of the Commission's Rules*, 5 FCC Rcd 4002 (1990).

[6] In view of the scope of the changes proposed by this notice, we may decide, in later action in this proceeding, to sever one or more of the issues raised herein for separate resolution.

[7] We emphasize that we are dealing only with the issue of past broadcast record in new applicant proceedings. The renewal expectancy analysis in comparative renewal proceedings rests on policy considerations that have no counterpart in new applicant proceedings. *See Formulation of Policies and Rules Relating to Broadcast Renewal Applicants*, 3 FCC Rcd at 5187-88 ¶¶ 51-60.

[8] Our discussion of the gender preference in this notice reflects our current practice. Recently, however, the United States Court of Appeals for the District of Columbia Circuit held that the Commission had not shown that the gender preference policy is substantially related to achieving programming diversity and that it is therefore unconstitutional. *Lamprecht v. FCC*, No. 88-1395 (D.C. Cir. Feb. 19, 1992). Accordingly, our discussion of the gender preference may require modification depending on the ultimate outcome of *Lamprecht*.

[9] We discuss our proposed treatment of another current enhancement factor, broadcast experience, at paragraph 36, *infra*.

[10] The continued use of minority and female credit raises a subsidiary question. Under *Anax Broadcasting, Inc.*, 87 FCC 2d 483 (1981), the Commission does not take the interests of passive owners -- such as limited partners or nonvoting stockholders -- into account in the comparative analysis. The so-called *"Anax* doctrine" has led to the formation of many applicants, the sole active principals of which are minorities or others who are integrated into management and often entitled to dispositive comparative credit. This in turn has spawned much litigation to determine whether the putative control that the nominally active principal has in such applicants is reliable. *Royce International Broadcasting, supra*. Although we may eliminate the integration criterion, the use of the diversification, minority and female ownership criteria would provide a continued opportunity to form questionable two-tiered applicants. The *Anax* problem would thus remain relevant. In a previous proceeding, we recognized that it would be desirable to reduce such burdensome litigation by modifying or eliminating the *Anax* Doctrine. *Proposals to Reform the Commission's Comparative hearing Process*, 5 FCC Rcd 4050, 4053 ¶¶ 21-23 (1990); 6 FCC Rcd 157, 161-62 ¶¶ 31-34 (1990). We did not, however, alter the *Anax* Doctrine in that proceeding. In view of our determination here to take further measures to reduce unnecessary litigation in comparative proceedings, we will revisit the *Anax* question. We invite commenters to address whether active owners should be required to have a minimum investment or equity in the applicant, whether the *Anax* Doctrine should be repealed, and other matters relevant to this issue.

[11] *See Review of the Technical Assignment Criteria*, 6 FCC Rcd 6273 (1991). In particular, *see id.* at 6275-76 ¶ 4, describing our intensive actions over five years to identify and address the problems of the AM service.

[12] The service continuity preference would thus be in addition to the provisions of 47 C.F.R. § 73.3597(a)(1), which require all permittees and licensees acquiring their stations pursuant to Commission decisions in comparative proceedings to own and operate the stations for one year. We note that our rules impose no such restriction on licensees acquiring their stations through assignments, under most circumstances, because these situations do not raise comparable concerns about the integrity of our processes. *See Transfer of Broadcast Facilities*, 52 RR 2d 1081 (1982) (repealing the former "anti-trafficking" rule). We stress that our action is premised on the belief that applicants voluntarily undertaking to hold their stations for three years offer a benefit to the public. Our action therefore should not be construed as imposing any additional restrictions on licensees who did not seek the service continuity preference. Nonetheless, commenters may wish to address whether the rationale of the service continuity preference would warrant our applying it to all new licensees selected by the comparative hearing process.

[13] We seek comment as to whether, as is the case with 47 C.F.R. § 73.3597, the restrictions against premature transfer by those receiving a service continuity preference should not apply where the licensee or permittee made a satisfactory demonstration that capital to operate the station was unavailable, that the station's principal had died or become disabled, or that other compelling circumstances justified the transfer. 47 C.F.R. § 73.3597(a)(4). We do not want the application of these exceptions in a comparative licensing system to undercut the basis for the service continuity preference. In addition, we do not intend that the restrictions on transfer would apply if the applicant claiming the service continuity preference received its grant through a settlement. *See Pan Pacific Television, Inc.*, 3 FCC Rcd 6629, 6631 ¶¶ 13-14 (1988). In this regard, we have recently amended the rule relating to settlements to discourage abuse of our processes. *Amendment of Section 73.3525*, 6 FCC Rcd 85 (1990), *recon. granted in part*, 6 FCC Rcd 2901 (1991).

[14] Petitions were filed on September 16, 1987 by Gerald Proctor (RM-7739), on March 8, 1991 by Jeffrey Rochlis (RM-7740), and on May 16, 1991 by Larry G. Fuss, et al. (RM-7741). Although the Commission could have adopted the finder's preference pursuant to the outstanding petitions, we considered it more advisable to address the matter in the context of this more comprehensive proceeding. However, we may revisit this determination if the instant proceeding is delayed or otherwise inconclusive.

[15] The proposed system is similar to one we have adopted in the instructional television fixed service (ITFS). 47 C.F.R. § 74.913. *See Amendment of Part 74*, 101 FCC 2d 49 (1985), *recon. denied*, 59 RR 2d 1355 (1986), *rev'd on other grounds sub nom. Telecommunications Research and Action Center v. FCC*, 836 F.2d 1349 (D.C. Cir. 1988).

[16] We note that 47 U.S.C. § 309(i), which governs the use by the Commission of any "system of random selection," requires that any such lottery be weighted to further the diversification of ownership of the mass media. *See Telecommunications Research and Action Center v. FCC*, 836 F.2d 1349 (D.C. Cir. 1988) (setting aside the tie-breaker lottery adopted for ITFS because of failure to demonstrate compliance with the provisions of 47 U.S.C. § 309(i)). Thus, it appears that any tie-breaker lottery would have to provide for the preferences set forth in the statute. We ask commenters to specifically address this issue.

[17] Accordingly, we will not in this proceeding treat the the manner in which the comparative criteria will be applied to the *Bechtel* case on remand or to other pending cases already designated for hearing. We will resolve questions concerning the applicability of the comparative criteria to these cases in forthcoming adjudications.

SEPARATE STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

In re: Reexamination of the Policy Statement on Comparative Broadcast Hearings

Just as I supported the procedural reforms that the FCC adopted last year to streamline and expedite the comparative hearing process for broadcast licenses, I endorse most of the substantive licensing reforms that we propose today. The current process -- particularly the so-called integration criterion -- has spawned much litigation and led to a deep cynicism about our licensing process, leading the D.C. Circuit to question the integrity of our process in a recent decision.

I strongly support the proposed service continuity preference for applicants who promise to hold their stations for at least three years. This should encourage greater stability in the industry as new broadcast stations enter the market, and the public interest will undoubtedly be better served by station owners who make a long-term commitment to their stations. Indeed, I would consider adopting a mandatory three-year holding period for all new broadcast station licensees.

I am troubled, however, by the proposal to eliminate the comparative criterion for proposed program service. Although I can appreciate the litigation and enforcement difficulties that may persist if we continue to use this

factor. I believe that the public interest is served by encouraging applicants to embrace an explicit commitment to news, public affairs, minority and foreign language programming, and other types of public service programming. I intend to review the comments on this issue carefully, especially as to how we can avoid some of the problems that have affected our implementation and enforcement of this factor in the past.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 10, 1992

COMMON CARRIER BUREAU LENGTHENS PLEADING DATES FOR US WEST PRICE CAP TARIFF TRANSMITTAL; FILING COULD INCREASE RATES UP TO $19.03 MILLION FOR CHANGES IN ACCOUNTING FOR POST-RETIREMENT BENEFITS FOR US WEST, BASED UPON AN INDUSTRY-WIDE STUDY FOR ALL LOCAL EXCHANGE COMPANIES UNDER PRICE CAPS

On April 3, 1992, US West Communications, Inc. filed Transmittal No. 246, to be effective August 1, 1992. The filing proposes increases in the company's price cap rate indexes. In its support information, US West justifies these increases as reflecting the incremental costs of implementing Statement of Financial Accounting Standards-106 (SFAS-106), "Employers Accounting for Postretirement Benefits Other Than Pensions" (OPEB). Prior to SFAS-106, OPEB benefits were generally booked on a "pay-as-you-go" basis, based on the amounts currently paid to retired employees. SFAS-106 requires that these benefits be recognized as deferred compensation and booked when the obligation to pay the benefits is incurred. SFAS-106 is a mandatory Generally Accepted Accounting Practice effective January 1, 1993 but may be voluntarily adopted earlier.

US West asserts that this change in accounting should be recognized as an exogenous cost change under the Commission's price cap plan. In support of its filing, US West submits an econometric study commissioned by the United States Telephone Association (USTA). The overall increase in US West's interstate price cap rate indexes would be $19.03 million in the period January 1, 1993 through June 30, 1993 (Description and Justification, Page 1-9).

An initial review of the US West transmittal indicates that it presents issues that are not limited to US West. The USTA study addresses the effects of SFAS-106 on all local telephone companies subject to the Commission's price cap plan. Moreover, a Bell Atlantic transmittal, filed February 28, 1992, raised similar issues. *See* Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 497. Pleadings in the Bell Atlantic transmittal were deferred to allow full consideration of the issues. *See* FCC Public Notice March 6, 1992.

Because the US West transmittal raises issues similar to the previously-filed Bell Atlantic transmittal, the Common Carrier Bureau is lengthening the period for filing petitions to US West Transmittal No. 246 under Section 1.773 of the Commission's Rules, 47 C.F.R. Sec. 1.773. Petitions should be filed no later than **May 1, 1992.** Replies should be filed no later than **June 1, 1992.**

For further information contact Michael Mandigo, Common Carrier Bureau, Tariff Division at (202) 632-6917.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CONTINENTAL MOBILE
TELEPHONE COMPANY, INC.;
CONSOLIDATED DISTILLED
PRODUCTS, INC.; and
LEAVITT COMMUNICATIONS, INC.,
Complainants,

v. File No. E-92-02

CHICAGO MSA
LIMITED PARTNERSHIP,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: April 10, 1992; Released: April 14, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On October 8, 1991, Continental Mobile Telephone Company, Inc., Consolidated Distilled Products, Inc., and Leavitt Communications, Inc., (together the "Complainants") filed a formal complaint with the Commission pursuant to Section 208 of the Communications Act[1] against Chicago MSA Limited Partnership ("CSLP"). The Complainants allege that CSLP has violated Sections 201(b) and 202(a) of the Act[2] and the Commission's policies prohibiting restrictions on the resale of cellular service. On December 9, 1991, CSLP filed an answer to the complaint in which it denies the allegations. CSLP also filed a motion to dismiss on December 9, alleging, *inter alia*, that the subject matter of the complaint is a state, not a federal, matter because it involves a dispute about rates for local exchange (cellular) service.[3] Subsequently, on February 7, 1992, CSLP filed a Motion to Hold Discovery in Abeyance pending disposition of its motion to dismiss in which it reiterates its claim that the Commission lacks subject matter jurisdiction over the complaint.[4]

2. Initially, we note that the Communications Act expressely provides private parties a right to file a complaint against carriers and obtain reparations if the party can establish that a carrier has violated the Act and the party has been damaged as a result of such violation.[5] Under the Commission's Rules, a *prima facie* case is established if a complaint contains "facts which, if true, are sufficient to constitute a violation of the Act or Commission order or regulation...."[6] The Commission has a duty to investigate any such complaint "in such manner and by such means as it shall deem proper.[7]

3. CSLP's claim that the Commission has no authority to review or examine its rates or charges in the context of this Section 208 proceeding is untenable. The case the Complainants present against CSLP is straightforward. The action they allege CSLP has "done or omitted to be done" in contravention of the Act is to violate the Commission's policy prohibiting restrictions on cellular resale by offering discount rates to certain customers that are lower than rates for the same service made available to Complainants for resale. *See Cellular Communications Systems*, 86 FCC 2d 469 (1981), *modified* 89 FCC 2d 58, *further modified*, 90 FCC 2d 571 (1982), *petition for review dismissed sub nom. United States v. FCC*, No. 82-1526 (D.C. Cir. March 3, 1983). Those policies clearly require that cellular carriers permit resellers to take service on the same terms and conditions, including wholesale or discount rates and charges, as any other cellular customer would take service.[8] CSLP, as a Comission cellular licensee,[9] is fully subject to these Commission policies and orders barring restrictions on the resale of cellular service.[10] While we have not prejudged the merits of the Complainants' claims at this early juncture of this proceeding, those claims are properly before us and discovery will proceed accordingly.

4. Therefore, we deny CSLP's Motion to Dismiss insofar as it seeks a ruling that the Commission lacks jurisdiction over the conduct alleged in the complaint. Since CSLP's Motion to Hold Discovery in Abeyance is premised on its unfounded jurisdictional claim, it too is denied.

5. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that CSLP's Motion to Dismiss, filed December 9, 1991, IS DENIED to the extent indicated above.

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[1] 47 U.S.C. § 208 (1991).

[2] 47 U.S.C. § 201(b) proscribes any unjust or unreasonable charge, practice, classification, or regulation for or in connection with interstate or foreign communication by a common carrier. 47 U.S.C. § 202(a) makes it unlawful for any carrier engaged in intrastate or foreign communication by wire or radio to "make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service...."

[3] In this Order, we address CSLP's Motion to Dismiss only to the extent that it contends that the Commission has no jurisdiction to entertain the instant complaint. Other issues raised in the motion will be addressed at a later time.

[4] The Complainants have filed oppositions to the Motion to Dismiss and the Motion to Hold Discovery in Abeyance.

[5] Specifically, the Act states that "any person" may petition the Commission in complaint of "anything done or omitted to be done" by any carrier in contravention of the Act, and that carriers shall be liable "for the full amount of damages sustained in consequence of any such violation." 47 U.S.C. §§ 206-209.

[6] 47 C.F.R. § 1.720(b).

[7] 47 U.S.C. § 208(a).

[8] *Id. See also*, Proposed Changes to the Commission's Cellular Resale Policies, Notice of Proposed Rulemaking and Order, 6 FCC Rcd 1719, 1725 (1991).

[9] CSLP was granted the cellular license to operate Frequency Block B in the Chicago Metropolitan Statistical Area on October 12, 1983.

[10] CSLP concedes that it offers its customers "discounted" or "wholesale" rates. *See* Motion to Dismiss at 3.

6. IT IS FURTHER ORDERED that CSLP's Motion to Hold Discovery in Abeyance, filed February 7, 1992, IS DENIED.

7. IT IS FURTHER ORDERED that a conference will be held in the offices of the Formal Complaints and Investigations Branch of the Enforcement Division on April 22, 1992, at 2 p.m., to discuss discovery and a schedule for further proceedings. Counsel for the above-captioned parties are required to attend.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-132

In the Matter of

Competition in the Interstate
Interexchange Marketplace

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: April 16, 1992; Released: April 17, 1992

By the Commission: Commissioner Duggan concurring in part and dissenting in part and issuing a separate statement.

I. INTRODUCTION

1. On August 1, 1991, we adopted a *Report and Order* concluding our examination of the state of competition in the interstate interexchange marketplace and adapting our regulatory policies to reflect this competition.[1] While the *Report and Order* took several steps to reduce the regulatory restrictions on AT&T's provision of business services, we declined to extend these reforms at that time to 800 and other inbound services.[2]

2. Eleven parties filed petitions for reconsideration of the *Report and Order*.[3] While petitioners sought reconsideration of several of the conclusions adopted in the *Report and Order*, six petitions focused on our treatment of 800 and other inbound services.[4] Because of the special significance of these issues and the need to address them promptly, we reconsider our treatment of 800 and other inbound services separately from the other issues raised by petitioners.

3. Based on a review of the record now before us, we conclude that we should grant in part and deny in part the petitions of Ad Hoc, AT&T, CompTel, MCI, Sprint, and WilTel, insofar as these petitions seek reconsideration of our rules adopted in the *Report and Order* governing the bundling of 800 and other inbound services with other services.[5] As discussed below, the 800 bundling rules adopted in the *Report and Order* appear to be overly narrow in some respects and overly broad in others. The modifications we now adopt better tailor those rules to meet our twin goals of promoting fair competition in the long-distance marketplace and providing customers with the flexibility to pursue the broadest range of service options.

4. We conclude, first, that until 800 number portability is available,[6] future bundling by AT&T of any service with 800 or inbound service using "old" 800 numbers (800 numbers that were in use by the customer on the day prior to the release of this order) is an unlawful practice under section 201(b) of the Communications Act.[7] Second, we conclude that the bundling of 800 or inbound service that uses "new" 800 numbers, with proper safeguards, will not create a significant risk of anticompetitive effects and therefore is permissible. Third, we conclude that the public interest will be served by modifying the grandfathering provision adopted in the *Report and Order* to apply to customers, rather than options. Thus, we allow the customers of Tariff 12s, Tariff 16s, or other tariffed offerings with bundled 800 or inbound service, to take service under their current arrangements, provided that the customer has signed a final contract for service or begun taking service on the day prior to the release of this order. In light of this change in the grandfathering provision, otherwise lawful modifications to service arrangements of grandfathered customers will be permitted.[8] Fourth, we reaffirm our decision in the *Report and Order* to allow grandfathered customers to terminate service within ninety days of the time 800 numbers become portable without incurring any early termination liability.

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[1] Competition in the Interstate Interexchange Marketplace, Report and Order, CC Docket No. 90-132, 6 FCC Rcd 5880 (1991).

[2] The term "800 services" refers to Price Cap Basket 2 offerings by AT&T which permit subscribers to agree in advance to pay for all calls made to them using a predesignated "800" number. The term "inbound service" refers to any other services or capabilities using an 800 number, including the inbound calling capabilities integrated in Tariff 12 packages.

[3] Petitions for reconsideration were filed by the Ad Hoc Telecommunications Users Committee (Ad Hoc); Aeronautical Radio, Inc. (ARINC); Alascom, Inc.; American Telephone and Telegraph Company (AT&T); Capital Cities/ABC, Inc, CBS Inc., and National Broadcasting Company, Inc. (the Broadcast Coalition); Citicorp; The Competitive Telecommunications Association (CompTel); the Independent Data Communications Manufacturers Association, Inc. (IDCMA); MCI Telecommunications Corporation (MCI); US Sprint Communications Company Limited Partnership (Sprint); and Williams Telecommunications Group, Inc. (WilTel). Oppositions were filed by Ad Hoc, the American Petroleum Institute (API), AT&T, the California Bankers Clearing House Association and the New York Clearing House Association (Banking Coalition), CompTel, MCI, and Sprint.

[4] Petitions raising issues relating to the bundling of 800 and inbound services were filed by Ad Hoc, AT&T, CompTel, MCI, Sprint, and WilTel. WilTel asks us to reconsider the *Report and Order* for the reasons set forth in CompTel's petition. Thus, when we discuss CompTel's arguments, we are also discussing WilTel's arguments.

[5] We make no decision with respect to the other issues raised by these or other petitioners at this time. Those issues will be considered in a future order.

[6] In an order adopted on August 1, 1991, we required local telephone companies to take steps that would permit 800 number portability by March 1993. *See* Provision of Access for 800 Service, Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd 5421, 5425 (1991).

[7] We are not applying this prohibition to Tariff 15 services at this time. We defer such a determination pending completion of the remand proceeding. *See* note 42, *infra*.

[8] *See* para. 31, *infra*.

II. BACKGROUND

5. In this proceeding, we undertook an examination of the state of competition in the interstate interexchange marketplace. Finding that there was substantial competition in the provision of most business services, we adopted a series of reforms designed to reduce regulatory restrictions on AT&T's provision of business services, including the elimination of existing price cap constraints and the allowance of "contract-based" tariffs.[9]

6. We excepted from these regulatory reforms AT&T's provision of 800 services. Although such services are important components of the business services market, we concluded that 800 services were not yet fully competitive.[10] We based this conclusion on the fact that 800 numbers are not portable under existing local exchange network technology, *i.e.*, a customer may not switch from one 800 service provider to another without also changing its 800 number. Although we found that the lack of number portability substantially affects only a minority of 800 customers, we concluded that it could, nevertheless, have an overall adverse effect on competition in 800 services.[11]

7. In order to protect AT&T's 800 service customers from the possibility of unlawfully high rates, we retained price cap regulation of AT&T's 800 services.[12] In addition, because of concerns that bundling of 800 services by AT&T could lead to anticompetitive leveraging, thereby harming competition for other services, we prohibited AT&T from including 800 or inbound services in contract-based tariffs or Tariff 12 integrated services packages until 800 numbers become portable.[13] Also, in a companion order, we required local telephone companies to take steps that would permit 800 number portability by March 1993.[14]

8. At the same time, we recognized that a number of existing Tariff 12 options included inbound service as a package component. In order to protect the expectancy interests of the customers of such options and to avoid causing these customers undue disruption during the relatively limited transition period to full number portability, we allowed Tariff 12 options on file as of August 1, 1991 to remain in effect, even if they included inbound service.[15] Finally, we provided that AT&T must permit customers with Tariff 12 packages that include inbound service to terminate these packages within ninety days of the time 800 numbers become portable without the imposition of any termination liabilities.[16]

9. After adoption of the *Report and Order*, AT&T filed a number of revisions to its grandfathered Tariff 12 options. To prevent the modification of generally available grandfathered options from undermining our bundling prohibition, the Common Carrier Bureau has accepted ministerial modifications[17] while rejecting other modifications.[18]

III. PETITIONS FOR RECONSIDERATION

10. Several parties have filed petitions for reconsideration of the *Report and Order*. Many of these petitions raise issues regarding the lawfulness of the 800/inbound service bundling prohibition and our related grandfathering criteria.

11. Ad Hoc and AT&T challenge our decision to prohibit all bundling of 800 service, stating that the bundling prohibition lacks record support and is based entirely on unsubstantiated economic theory.[19] They argue that there is a wide gap between the problem that we actually found to exist and the remedy we imposed to correct it. They state that we found that the risk of leveraging applied at most to a relatively small minority of current AT&T 800 customers, but that we prohibited all future bundling of 800 service by AT&T until 800 numbers become portable.[20] They claim that the bundling restriction is so broad that it prevents customers from taking advantage of bundled offerings, even if the customers can establish they are not "captive" to AT&T and are not subject to leveraging.[21]

12. Although Ad Hoc and AT&T argue that no 800 bundling restriction is necessary, they suggest that, at the very least, we should: allow AT&T to bundle 800 or inbound service when the customer is using 800 numbers that came into use after January 1, 1987; allow AT&T to show, in other cases, that a particular customer is not "captive," and thus not subject to leveraging; and, prohibit the bundling of 800 or inbound service only in any options or contracts in which the proportion of 800 service to other services is greater than some threshold level, and only if the customer elects to retain its old 800 number.[22]

13. AT&T also challenges our decision to permit grandfathered Tariff 12 customers to terminate service, without termination liability, within 90 days of the time when 800 numbers become portable -- the "fresh look" requirement. AT&T states that because some options have large upfront costs that are recovered from customers only over the life of the contract, the "fresh look" provision may unreasonably deny AT&T the ability to recover its

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[9] *See* 6 FCC Rcd at 5880-5881.

[10] 6 FCC Rcd at 5904.

[11] *See* 6 FCC Rcd at 5905.

[12] 6 FCC Rcd at 5905.

[13] 6 FCC Rcd at 5905-5906. The application of the bundling prohibition to Tariff 16 and other offerings bundling 800 or inbound services with other services is discussed in paragraph 20, *infra*.

[14] *See* Provision of Access for 800 Service, Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd 5421, 5425 (1991).

[15] 6 FCC Rcd at 5906. We later revised the grandfathering date to include all Tariff 12 options on file as of September 1, 1991. Competition in the Interstate Interexchange Marketplace, Memorandum Opinion and Order, CC Docket No. 90-132, FCC No. 91-390 (Nov. 25, 1991).

[16] 6 FCC Rcd at 5906.

[17] *See, e.g.,* AT&T Transmittal No. 3364, DA 91-1542 (Com.Car.Bur. December 11, 1991); AT&T Transmittal No. 3387, DA 91-1575 (Com.Car.Bur. December 19, 1991).

[18] *See, e.g.,* AT&T Transmittal No. 3375, DA 91-1577 (Com.Car.Bur. December 19, 1991); AT&T Transmittal No. 3405, DA 91-1622 (Com.Car.Bur. December 24, 1991); AT&T Transmittal No. 3706, DA 92-5 (Com.Car.Bur. January 3, 1992).

[19] Ad Hoc Petition at 7-10; AT&T Petition at 2-3.

[20] Ad Hoc Petition at 5-7, 10-11; AT&T Petition at 3-6, *citing Report and Order*, 6 FCC Rcd at 5905-5906.

[21] Ad Hoc Petition at 6-7; AT&T Petition at 5-6.

[22] *See* Ad Hoc Petition at 10-11; AT&T Petition at 5-6.

costs.[23] AT&T also claims that we failed to give proper notice of the potential changes in Tariff 12 and we have thereby violated the Administrative Procedure Act (APA).[24] AT&T further asserts that the "fresh look" requirement is an unlawful prescription under section 205 of the Communications Act. It argues that "fresh look" may only be imposed if we first find that the existing service terms are unlawful and that the results of "fresh look" are just and reasonable.[25]

14. While Ad Hoc and AT&T claim that the 800 bundling rules are too strict, CompTel, MCI, and Sprint argue that they are not strict enough. CompTel and MCI claim that our decision to prohibit bundling of 800 service with contracts and Tariff 12 options necessarily means that we found bundling to be unlawful.[26] They also argue that under existing case law, we cannot permit an unlawful rate or practice, except under the narrowest of circumstances.[27] CompTel, MCI, and Sprint argue that since our rationale for grandfathering was to protect the reliance interest of existing customers, the decision to grandfather Tariff 12 options is too broad and goes beyond the limited power we have to permit unlawful practices to continue in effect.[28] They urge us to grandfather customers, rather than options, arguing that would be more consistent with our stated rationale.

IV. OPPOSITIONS

15. CompTel, MCI, and Sprint oppose the petitions of Ad Hoc and AT&T. They claim that our decision to prohibit the bundling of 800 and inbound service in all future Tariff 12 options and contracts is fully justified. They argue that our findings with respect to the competitiveness of 800 services and AT&T's ability to exploit the unwillingness of its 800 customers to switch carriers is supported by solid record evidence.[29] They also argue, along with Ad Hoc, API, and the Banking Coalition, that "fresh look" should be retained. They claim generally that we gave parties sufficient notice of "fresh look,"[30] that no section 205 problem is created by our adoption of "fresh look,"[31] and that, as a policy matter, we must allow "captive" customers to terminate their bundled service arrangements as soon as 800 numbers become portable.[32]

16. Ad Hoc, API, AT&T, and the Banking Coalition oppose modifying the *Report and Order* to grandfather customers rather than existing Tariff 12 options. They argue that since we have not found the bundling of 800 and inbound service to be an unlawful practice, existing Tariff 12 options may remain generally available.[33] They deny that the grandfathering of Tariff 12 options will permit AT&T to circumvent the bundling prohibition.[34]

V. DISCUSSION

17. We now modify the *Report and Order* in the following manner. We conclude, first, that until 800 number portability is available, future bundling by AT&T of any service with 800 or inbound service using "old" 800 numbers is an unlawful practice under section 201(b) of the Communications Act. Second, we conclude that the bundling of 800 or inbound service that uses "new" 800 numbers, with proper safeguards,[35] will not create a significant risk of anticompetitive effects and is therefore permissible in AT&T's contract-based tariffs, Tariff 12s, Tariff 16s, and other bundled offerings. Third, we conclude that the public interest will be served by modifying the grandfathering provision adopted in the *Report and Order*. Most significantly, we apply the grandfathering provision to customers, rather than options. We allow the customers of Tariff 12s, Tariff 16s, or other tariffed offerings with bundled 800 or inbound service to take service under their current arrangements, provided that the customer has signed a final contract for service or begun taking service on the day prior to the release of this order.[36] In light of this change in the grandfathering provision, otherwise lawful modifications to service arrangements of grandfathered customers will be permitted.[37] Fourth, we reaffirm our decision in the *Report and Order* to allow grandfathered

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[23] AT&T Petition at 19. AT&T filed an emergency application, pursuant to section 214 of the Communications Act, 47 U.S.C. § 214, to discontinue one Tariff 12 option (Option 58) for precisely this reason. The Common Carrier Bureau dismissed that application as not establishing an emergency. *See* Letter from James R. Keegan, Chief, Domestic Facilities Division, Common Carrier Bureau, to Steven Haas, Division Manager, AT&T, January 31, 1991.

[24] AT&T Petition at 10-13. Although Ad Hoc supports "fresh look", Ad Hoc Opposition at 11-15, it expressed similar APA concerns with respect to the application of the bundling prohibition to Tariff 12 options. Ad Hoc Petition at 3-4, 10.

[25] AT&T Petition at 13-18, *citing*, AT&T v. FCC, 449 F.2d 439, 450, 452 (2d Cir. 1971); AT&T v. FCC, 487 F.2d 865, 872 n.13 (2d Cir. 1973).

[26] *See* CompTel Petition at 20, MCI Petition at 6-7.

[27] MCI Petition at 7-9, *citing*, MCI Telecommunications Corp. v. FCC, 712 F.2d 517, 535 (D.C. Cir. 1983). *See also*, CompTel Petition at 20-21.

[28] *See* CompTel Petition at 21-22; MCI Petition at 9-11. *See also* Sprint Petition at 5-9.

[29] CompTel Opposition at 6-8; MCI Opposition at 17; Sprint Opposition at 2-4.

[30] *See* API Response at 5-10; Banking Coalition Opposition at 5-8; CompTel Opposition at 10-12; MCI Opposition at 17-24; Sprint Opposition at 12-17.

[31] *See* API Response at 10-15; Banking Coalition Opposition at 8-9; CompTel Opposition at 12-15; Sprint Opposition at 17-18.

[32] *See* Ad Hoc Opposition at 11-15; API Response at 4; Banking Coalition Opposition at 9-12; CompTel Opposition at 9; MCI Opposition at 14-16; Sprint Opposition at 12-17.

[33] Ad Hoc Opposition at 6; AT&T Opposition at 11-13.

[34] API Opposition at 15-17; Banking Coalition Opposition at 13.

[35] *See* para. 22, *infra*.

[36] We note that several resellers have alleged that AT&T unreasonably delayed filling their orders for existing Tariff 12 options. We made it clear in our decision in the Tariff 12 proceeding that AT&T could not lawfully restrict the resale of Tariff 12 packages. AT&T Communications, Revisions to Tariff F.C.C. No. 12, *Memorandum Opinion and Order on Remand*, CC Docket No. 87-568, 6 FCC Rcd 7039, 7053-7055 (1991). If we conclude that AT&T has unreasonably delayed providing these generally available options to any entity, we will extend the grandfathering provision to include such entities.

[37] Of course, proposed modification must not violate other Commission requirements, such as establishing geographic limitations on availability of a Tariff 12 option. *See, e.g.*, AT&T Communications Revisions to Tariff F.C.C. No. 12, *Memorandum Opinion and Order*, CC Docket No. 87-568, 4 FCC Rcd 4932, 4938, *rev'd on other grounds*, MCI Telecommunications Corp. v. FCC, 917 F.2d 30 (D.C. Cir. 1990).

customers to terminate service within ninety days of the time 800 numbers become portable without incurring any early termination liability.

18. Ad Hoc and AT&T argue that our decision to prohibit the bundling of 800 services is not supported in the record and is based on unsubstantiated economic theory. We disagree. Our findings with respect to the competitiveness of 800 services were made in response to substantial record evidence.[38] While we found that some of AT&T's competitors had overstated the risk and impact of leveraging, we nevertheless found that some, so-called "captive," customers are unable to change their 800 number without incurring substantial costs, and that AT&T retains the ability to leverage market power in 800 and inbound services with respect to these customers through the inclusion of 800 or inbound services in contracts and Tariff 12s. We stated that:

> [l]everaging could occur, for example, if AT&T offered a "captive" 800 service subscriber discounts on 800 service conditioned upon the customer's purchase of another service from AT&T -- for example, if AT&T offered a customer a bundled contract of 800 service and WATS service, with ten percent discounts on each. In this example, assuming equal usage of 800 and WATS, an AT&T competitor would have to offer a twenty percent discount on WATS in order to win the customer's WATS business. In other words, because the customer is committed to AT&T's 800 service, AT&T's competitors would have to include, in their WATS discount, compensation to the customer for foregoing the 800 service discount available in AT&T's package.[39]

In light of the above, we reject Ad Hoc and AT&T's arguments and conclude that future bundling of any service with 800 or inbound service using "old" 800 numbers will be an unlawful practice under Section 201(b) of the Communications Act until 800 number portability is available.[40] We define "old" 800 numbers as numbers in use by the customer on the day prior to release of this order.

19. We agree with Ad Hoc and AT&T, however, that the prohibition fashioned in the *Report and Order* could be more narrowly tailored to remedy the problem posed by leveraging. We have found that leveraging is a significant risk with respect to "captive" 800 service customers -- customers that are unable to change their 800 number without incurring substantial costs. Customers obtaining a new 800 number would rarely fall into this category.[41] Therefore, these customers are not generally subject to leveraging and AT&T should not be precluded from offering them service arrangements that include bundled 800 or inbound service.

20. We also find that the bundling prohibition adopted in the *Report and Order*, and modified here, should apply not only to contracts and Tariff 12s, but also to Tariff 16s and other bundled service offerings.[42] To hold otherwise could negate our anti-bundling policy by allowing AT&T to funnel 800 and inbound service customers away from one offering and into other bundled arrangements.[43] Moreover, the rationale used to support our prohibition of 800 and inbound bundling in the *Report and Order*,[44] is equally applicable to 800 and inbound bundling in Tariff 16s and other service offerings.

21. In light of these conclusions, we modify the prohibition adopted in the *Report and Order* as follows: (1) we conclude that future bundling of "old" 800 numbers with other services will be an unlawful practice under section 201(b) of the Communications Act until 800 number portability is available; and (2) we will allow AT&T to bundle 800 or inbound service in its contracts, Tariff 12s, Tariff 16s, and other offerings, so long as the 800 numbers were not in use by the customer taking such service, or any of its corporate affiliates, on the day prior to the release of this order.[45] By excepting customers willing to take new 800 numbers from the ban adopted in the *Report and*

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[38] *See* 6 FCC Rcd at 5903-5906.

[39] 6 FCC Rcd at 5906, n.234.

[40] Once 800 number portability is generally available, *see Report and Order*, 6 FCC Rcd at 5905, n. 233, the bundling restriction will expire.

[41] A customer using a new 800 number could be "captive" to a specific carrier only if the customer was committed to obtaining a specific number, despite never having used it before. In that case, in order to receive the desired number, the customer would have to take its 800 service from the IXC to which the first three digits (the NXX code) for that number was assigned. A customer in this situation is far less likely to be captive to a particular carrier than a customer with an existing 800 number because it would not have invested resources in advertising the number, it would not have acquired a public association with that number, and it would not incur the expenses associated with an 800 number change, including the expenses of changing such materials as manuals, brochures, warranties, and catalogs.

[42] We are not applying the bundling prohibition to Tariff 15 services at this time. In January of this year, we were granted a voluntary remand of our decision that AT&T's Tariff 15 offering to Resort Condominiums International was unlawfully discriminatory. AT&T Communications Tariff F.C.C. No. 15, Competitive Pricing Plan No. 2, Resort Condominiums International, *Memorandum Opinion and Order*, CC Docket No. 90-11, 6 FCC Rcd 5648 (1991), *remanded*, AT&T v. FCC, *Order*, D.C. Circuit No. 91-1504 (filed January 21, 1992). While it appears that the bundling prohibition, as modified in this order, should reasonably apply to the bundling of 800 service in Tariff 15s, in the interest of receiving the benefit of a full record on the relationship of the bundling issue with other issues raised by Tariff 15, we will address the lawfulness of bundling in Tariff 15 in that remand proceeding. *See* AT&T Communications, Tariff F.C.C. No. 15, Competitive Pricing Plan No. 2, Resort Condominiums International, *Supplemental Designation Order*, CC Docket 90-11, FCC No. 92-180, (released April 16, 1992).

[43] While the *Report and Order* did not specifically address bundling outside the context of Tariff 12 and contract-based tariffs, our *Notice of Proposed Rulemaking* sought comment on the impact of 800 services on competition for other services offered by AT&T. We therefore provided adequate and proper notice that we might adopt rules regulating all 800 and inbound service bundling. Competition in the Interstate Interexchange Marketplace, Notice of Proposed Rulemaking, 5 FCC Rcd 2627, 2641 (1990) (hereinafter *"NPRM"*). Accordingly, our decision here to extend the bundling prohibition is fully consistent with the scope of the NPRM.

[44] *See* para. 18, *supra*.

[45] In adopting the prospective policy on 800 bundling, we conclude that "old" 800 numbers are those used by a customer as of the day before the release of this order. Based on the record submitted on reconsideration, we determine that, on a going-forward basis, customers using "new" 800 numbers bundled with other services will be able to deal with all interexchange carriers on a comparable basis. *See* AT&T Petition at 5-6. We reject Ad Hoc's argument that, because competi-

Order, we tailor the bundling prohibition more narrowly to solve the problem of possible anticompetitive leveraging. In particular, we exclude from the bundling prohibition: (1) "new" AT&T 800 service customers -- that is, customers not taking 800 service from AT&T on the day prior to release of this order; and (2) existing AT&T 800 customers insofar as they take new 800 numbers, or switch some or all of their old 800 numbers to new 800 numbers, in order to obtain a discount for bundled service with new 800 numbers.[46] In short, our modified rules more narrowly tailor the bundling prohibition to preclude bundling only in situations that pose a risk of leveraging.[47]

22. In order to ensure that AT&T does not include traffic from any old 800 numbers retained by a customer in the bundled discounts it provides for traffic using the customer's new 800 numbers, we here require AT&T to file with us a compliance affidavit as well as reports identifying the customers taking bundled 800 service and their old and new 800 numbers. Specifically, AT&T must provide to us, with any new contract-based tariff, Tariff 12, Tariff 16, or other bundled offering that combines 800 or inbound service with other services, an affidavit signed by a corporate officer of AT&T indicating that AT&T will not: (1) extend to old 800 numbers the rates applicable to lawfully bundled new 800 numbers; or (2) include, directly or indirectly, traffic from any old 800 numbers retained by the customer in the calculation of the rates applicable to a customer's new 800 number service associated with its bundled offering.[48] In addition, before any customer begins taking service under any contract-based tariff, Tariff 12, or Tariff 16, AT&T must file with the Common Carrier Bureau, a list of any old 800 numbers used by that customer and its affiliates, and the new 800 numbers for that customer. For each time a new customer takes any other tariffed service bundling 800 or inbound service, AT&T must within thirty days of the effective date of this order, and every thirty days thereafter until the bundling restriction is lifted, provide us any old 800 numbers used by each such customer and its affiliates, and the new 800 numbers used by each customer.[49] AT&T may request confidential treatment of this information. We find that these measures will enable us to administer and enforce our bundling prohibition.[50]

23. AT&T also challenges our decision to allow grandfathered customers to terminate service, without termination liability, within ninety days of the time 800 numbers become portable -- the "fresh look" requirement. AT&T claims that, in adopting "fresh look," we violated the Administrative Procedure Act (APA) by failing to provide AT&T and other parties with adequate notice of and opportunity to comment on the "fresh look" requirement. We disagree. The APA requires only that the agency include in its Notice of Proposed Rulemaking ("NPRM") "either the terms or substance of the proposed rule or a description of the subjects and issues involved.[51] As held by the courts, evidence in the record may warrant a final rule different from that proposed by the agency.[52] According to the United States Court of Appeals for the District of Columbia Circuit, "the exact result reached after a notice and comment rulemaking need not be set out in the initial notice for the notice to be sufficient. Rather, the final rule must be 'a logical outgrowth' of the proposed rule.[53] We believe that, in seeking comment on the status of competition in the interexchange marketplace, in asking "for comment on whether the current level of competition in 800 services warrants an interim regulatory approach to services in the 800 Services Basket," and in asking for comment on the impact of 800 services on competition for other services, we gave notice that interim regulatory changes might be adopted for 800 and inbound services.[54] The "fresh look" requirement is a logical outgrowth of the proposed action. Also, as MCI notes, AT&T had actual notice of the possibility of regulatory changes involving 800 bundling and Tariff 12, as evidenced by several *ex parte* presentations made by AT&T addressing 800 bundling in the context of Tariff 12.[55] In light of the above, we find that our: decision to adopt the "fresh look" requirement satisfied the APA notice requirements.

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tion in 800 services began in January of 1987, bundling of 800 and inbound service should be allowed if the 800 numbers provided under the package were not in use by the customer prior to January 1, 1987. While competition in 800 services was introduced on January 1, 1987, AT&T had significant competitive advantages at that time. For example, during the early days of NXX access AT&T had a far greater number of NXX codes than did any of its competitors.

[46] In June of 1990, the Common Carrier Bureau found that an AT&T tariff bundling SDN service and 800 services violated section 201(b) of the Communications Act. *See* AT&T Communications, Revisions to Tariff F.C.C. Nos. 1 and 2, Transmittal Nos. 2071, 2212, Memorandum Opinion and Order, DA 90-824 (Com.Car.Bur. June 8, 1990), *Application for Review pending* (filed June 25, 1990). This bundled offering may now be provided by AT&T subject to the terms of this order.

[47] Ad Hoc and AT&T suggest that the prohibition could be even further narrowed by allowing some customers with old 800 numbers to receive bundled service if 800 or inbound service is less than some threshold percentage of the total package, or if the customer can otherwise show it would not incur substantial costs in changing 800 numbers. We do not believe it is appropriate to adopt this suggestion. The ban, as we have restructured it, would allow customers with old 800 numbers to show they are not "captive" by giving up their old numbers.

[48] One way in which AT&T could impermissibly include traffic from old 800 numbers indirectly in the calculation of the rates applicable to new 800 numbers is through the use of software programming capable of diverting traffic placed to old 800 numbers to the new 800 numbers.

[49] We also require AT&T to retain sufficient billing information to enable the Bureau to audit AT&T's compliance with the requirements of this order.

[50] We also note that violations by AT&T could subject the company to fine and forfeiture liability. *See, e.g.*, 47 U.S.C. §§ 502, 503.

[51] 5 U.S.C. sec. 553(b)(3).

[52] *See* MCI opposition at 19, *citing* Edison Electric Institute v. OSHA, 849 F.2d 611, 621 (D.C. Cir. 1988). *See also* International Harvester Co. v. Ruckelhaus, 478 F.2d 615, 632 (D.C. Cir. 1973).

[53] Public Service Commission of the District of Columbia v. FCC, 906 F.2d 713, 717 (D.C. Cir. 1990), *citing* AFL-CIO v. Donovan, 757 F.2d 330, 338 (D.C. Cir. 1985); United Steelworkers v. Marshall, 647 F.2d 1189 (D.C. Cir. 1980), *cert. denied sub nom.* Lead Industries Association v. Donovan, 453 U.S. 913 (1981).

[54] *NPRM, supra*, 5 FCC Rcd 2627, 2641 (1990). *See Id.* at 2628, 2635-2636 (1990). *See also* Banking Coalition Opposition at 5-8; API Response at 5-10; MCI Opposition at 18-24; CompTel Opposition at 9-12; Sprint Opposition at 11-14.

[55] MCI Opposition at 23. *See, e.g., ex parte* letter from Joel E. Lubin, Regulatory Vice President, Government Affairs, AT&T, to Donna Searcy, Secretary, FCC, November 30, 1990; *ex parte*

24. AT&T also argues that the "fresh look" requirement constitutes an unlawful prescription under section 205 of the Communications Act. It claims that a "fresh look" may only be imposed if we first find that the existing service terms are unlawful and that the remedy "fresh look" imposes is just and reasonable. API, the Banking Coalition, and CompTel disagree with AT&T's reading of the applicable law. They contend that policies adopted in rulemaking proceedings that affect, but do not set, rates do not constitute unlawful prescriptions within the meaning of section 205.[56] They argue further, that even if section 205 requires us to provide AT&T the opportunity for a hearing, that requirement was met by the notice and comment cycle.[57]

25. We agree that "fresh look" does not violate section 205 of the Communications Act. The "fresh look" requirement was adopted in a rulemaking proceeding and is well within our rulemaking authority under the Communications Act.[58] In any event, AT&T and all other parties were notified in the NPRM that we intended to consider rule changes in the 800 services marketplace in the context of section 205 of the Act.[59] The "fresh look" requirement was adopted in the *Report and Order* under the authority, *inter alia*, of section 205.[60] Implicit in our decision to adopt "fresh look" is a finding that AT&T's termination liability clauses will be unreasonable in light of the risk of leveraging in 800 services. Through the original notice and comment proceeding, and the reconsideration process, AT&T and other parties have been given ample opportunity to have their arguments heard. We now affirm that AT&T's termination liability clauses are unreasonable, and reject AT&T's argument that the "fresh look" requirement violates section 205 of the Act.[61]

26. Finally, AT&T challenges the "fresh look" requirement on policy grounds, stating that because some options have large upfront costs which are recovered from customers only over the life of the contract, the "fresh look" requirement may unreasonably deny AT&T the ability to recover its costs. AT&T fears that customers will flock to these options and then opt to terminate service prior to the end of the contract. We believe that by grandfathering customers instead of options, we can address AT&T's concerns while preserving the benefits of the "fresh look" requirement. By applying the grandfathering provision to customers,[62] we eliminate the possibility that customers will "flock" to options with large upfront costs and qualify for "fresh look." Thus, we find that the policy concerns AT&T expressed with respect to "fresh look" have been largely mitigated. To the extent that AT&T can demonstrate in specific instances that application of the "fresh look" requirement will cause substantial losses that are not sufficiently offset by other valid public policy concerns, we will entertain requests for waiver of that requirement.[63]

27. CompTel, MCI, and Sprint argue that the grandfathering provision in the *Report and Order* should apply to customers of Tariff 12 options rather than to Tariff 12 options. They state that, having found that bundling of 800 or inbound service with other services is an unlawful practice, our authority to allow that practice to continue is very limited and does not extend to new customers.[64] We believe that it would be in the public interest to institute a more narrowly tailored grandfathering requirement. We therefore modify the *Report and Order* to grandfather customers rather than options. We find that grandfathering options results in the proliferation of an unlawful practice to additional customers, and undercuts our bundling prohibition. Grandfathering customers prevents this proliferation, while ensuring that grandfathered options will remain available to any customer willing to take a "new" 800 number.

28. We also find that the grandfathering provision adopted in the order, and modified here, should apply not only to Tariff 12s, but also to Tariff 16s and other bundled service offerings.[65] In extending our bundling prohibition to Tariff 16s and other bundled tariffed offerings, we conclude that the equitable considerations we relied on to justify grandfathering of Tariff 12s are similarly applicable to Tariff 16s and other existing tariffed offerings that include bundled 800 or inbound service. We believe that we should protect the expectancy interests of customers with bundled Tariff 12s, Tariff 16s, and other tariffed offerings to avoid causing these customers undue disruption during the relatively limited transition period to full number portability.[66] Accordingly, we now conclude that the public interest is served by extending our grandfathering rules to customers of Tariff 16s and other tariffed offerings with bundled 800 or inbound service.

29. Upon reconsideration, we will allow the customers of Tariff 12s, Tariff 16s, or other tariffed offerings with bundled 800 or inbound service that have signed contracts for service or begun taking service on the day prior to the release of this order to continue to take service under their current arrangements. Indeed, the equitable considerations

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letter from Joel E. Lubin, Regulatory Vice President, Government Affairs, AT&T, to Donna Searcy, Secretary, FCC, July 18, 1991.

[56] *See*, for example, Banking Coalition Opposition at 8-9, *citing*, Western Union Telegraph Co. v. FCC, 665 F.2d 1126, 1151 (D.C. Cir. 1981) (*citing*, AT&T v. FCC, 572 F.2d 17, 21-23 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1978)); CompTel Opposition at 13-14.

[57] API Response at 11-12, *citing* AT&T v. FCC, 572 F.2d at 22-23; Banking Coalition Opposition at 8-9; CompTel Opposition at 14.

[58] *See Report and Order*, 6 FCC Rcd at 5912.

[59] *See* Competition in the Interstate Interexchange Marketplace, Notice of Proposed Rulemaking, 5 FCC Rcd 2627, 2628, 2635-36, 2641, 2659, n.234 (1990).

[60] *See* 6 FCC Rcd at 5906, 5912.

[61] *See* AT&T v. FCC, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978).

[62] *See* para. 27, *infra*.

[63] One example of a Tariff 12 option that AT&T asserts has large upfront costs is option 58.

[64] *See* MCI Petition at 6-11. AT&T challenges the premise for this argument, contending that we never expressly found the bundling of 800 and inbound services by AT&T to be an unlawful practice. Opposition at 11. However, in light of our conclusion that future bundling of "old" 800 numbers with other services is an unlawful practice under section 201(b) of the Communications Act until 800 number portability is available, we reject AT&T's contention. *See* paras. 18, 21, *supra*.

[65] We are not applying the grandfathering provision to Tariff 15 services at this time. *See* note 42, *supra*.

[66] *See Report and Order*, 6 FCC Rcd at 5906.

on which the grandfathering provision was based apply only to existing customers, and not to other customers who may wish to take service under grandfathered deals.[67]

30. In order to enforce the grandfathering provision as modified, we direct AT&T to provide us, within 90 days of the release of this order, a list of customers of existing Tariff 12s, Tariff 16s, and other tariffed offerings with bundled 800 or inbound service, and the 800 numbers associated with each. AT&T may request confidential treatment of this information.

31. In order to ensure that the 800 and inbound services bundling prohibition we adopted in the *Report and Order* was not undermined by our grandfathering of options rather than customers, the Common Carrier Bureau rejected all non-ministerial modifications of grandfathered package deals.[68] Several customers of these deals, however, citing the need to modify their service arrangement to keep up with changes in their business, request that we permit substantive modifications.[69] In light of our decision to modify the *Report and Order* to grandfather only existing customers of Tariff 12s, Tariff 16s, or other tariffed offerings bundling 800 or inbound service with other services, we here permit otherwise lawful modifications of Tariff 12s, Tariff 16s, or other tariffed offerings that fall within the grandfathering provision.[70]

VI. CONCLUSION

32. In light of the findings above, we modify our treatment of the bundling of 800 and inbound services in the *Report and Order*. We conclude, first, that until 800 number portability is available, future bundling by AT&T of any service with 800 or inbound service using "old" 800 numbers (800 numbers that were in use by the customer on the day prior to the release of this order) is an unlawful practice under section 201(b) of the Communications Act. Second, we conclude that the bundling of 800 or inbound service that uses "new" 800 numbers (800 numbers not in use by the customer on the day prior to the release of this order), with proper safeguards, will not create a significant risk of anticompetitive effects. Third, we conclude that the public interest will be served by modifying the grandfathering provision adopted in the *Report and Order* to grandfather customers, rather than options. Accordingly, we allow the customers of Tariff 12s, Tariff 16s, or other tariffed offerings with bundled 800 or inbound service to take service under their current arrangements, provided that the customer has signed a final contract for service or begun taking service on the day prior to the release of this order. In light of this change in the grandfathering provision, otherwise lawful modifications to service arrangements of grandfathered customers will be permitted. Fourth, we reaffirm our decision in the *Report and Order* to allow grandfathered customers to terminate service within ninety days of the time 800 numbers become portable without incurring any early termination liability.

VII. ORDERING CLAUSES

33. Accordingly, pursuant to authority contained in sections 1, 4 and 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, IT IS ORDERED that the policies, rules and requirements set forth herein ARE ADOPTED.

34. IT IS FURTHER ORDERED that the petitions for reconsideration of Ad Hoc, AT&T, CompTel, MCI, Sprint, and WilTel are GRANTED IN PART AND DENIED IN PART, insofar as the petitions seek reconsideration of our treatment of 800 and inbound services in the *Report and Order*.

35. IT IS FURTHER ORDERED that MCI Telecommunications Corporation's request that we accept its late filed opposition under this docket is GRANTED.

36. IT IS FURTHER ORDERED that the provisions in this *Report and Order* will be effective immediately upon its release.[71]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[67] We have grandfathered customers for equitable reasons before. For example, in finding that local exchange carrier individual case basis (ICB) rates for DS-3 service were unlawful, we allowed ICB rates to remain in effect for a limited period of time for customers already receiving service under ICB rates in order to facilitate a smooth transition to general tariffed rates and to avoid disruption of service to customers. Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, *Memorandum Opinion and Order*, 4 FCC Rcd 8634, 8642-8644 (1989). *See also* MCI Telecommunications Corporation v. FCC, 627 F.2d 322, 338 (D.C. Cir. 1980).

[68] The Common Carrier Bureau rejected non-ministerial modifications because modifying existing options could be a vehicle for avoiding the bundling prohibition. For example, AT&T could modify an existing Tariff 12 option to make it fit the needs of several non-Tariff 12 customers.

[69] *See*, for example, CompuServe Reply at 5-9; Letter from Leo J. Heile, Vice President and Chief Information Systems Officer, ITT Corporation, to Richard M. Firestone, Chief, Common Carrier Bureau, January 16, 1992.

[70] Customers wanting to modify a grandfathered service package may file those tariff modifications with the Commission on fourteen days notice. Pending modifications will be reviewed consistent with the rules adopted herein.

[71] The publication of a rule may be made less than 30 days from publication in the Federal Register where good cause exists. *See* 5 U.S.C. § 553 (d)(3). In order to avoid unduly delaying the benefits customers will receive from service options that are consistent with our decision in this order, we find good cause to make this order effective upon release.

In re: Competition in the Interstate Interexchange Marketplace (CC Docket No. 90-132)

Separate Statement of Commissioner Ervin S. Duggan

Concurring in Part and Dissenting in Part

I join with my fellow Commissioners in voting to amend the "grandfathering" rules we adopted last August. On reconsideration, we have revised the grandfathering provision to accommodate more closely the competing considerations we identified in the Report and Order.[1] By grandfathering existing customers and allowing them to revise their Tariff 12 options, we recognize that existing customers would suffer serious hardship if they were prohibited from revising their options as their business needs change. On the other hand, by allowing AT&T to add additional customers to those options only if the customer changes its 800 number, we have limited AT&T's ability to leverage its control in the 800 market into other, more competitive, interexchange services.

In two respects, however, I believe the remedy as crafted by the majority does not closely enough fit the problem in the 800 market, at least as I see it. First, I would have defined "new" number as "brand new." Second, I would not have allowed 800

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, 6 FCC Rcd 5880 (1991).

bundling in contract-based tariffs, at least not without obtaining further comment. I find it necessary, therefore, to dissent on these two grounds.

My difference of opinion may be based in part on a difference in the way I perceive the nature of the 800 market. In my view, until we reach number portability, there will be some danger of such leveraging with respect to all existing 800 customers of AT&T.

For any 800 customer there are costs associated with changing an 800 number. For some customers the cost of changing an 800 number may be low; for others, it will be substantially higher. For others, the cost--- both financial and intangible---is so great that they would simply be unwilling to change 800 carriers under any circumstances. But lack of number portability is a competitive issue whether or not a customer is a complete "captive" of a particular carrier. If AT&T's competitors, in order to challenge AT&T for the business of its 800 customers, must compensate those customers for the cost of changing their 800 numbers, are the competitors not at a competitive disadvantage in competing for 800 customers and for bundled packages that include 800 service?[2]

[2] Competition in the 800 market began in 1987, when AT&T started out with 100 percent of the market. While its market share has declined since then, AT&T still has the dominant share of the 800 business.

I nevertheless support the "old number/new number" distinction we adopt on reconsideration because it addresses this competitive advantage. If AT&T's customers are routinely required to change their 800 numbers as a condition of taking a bundled offering from AT&T, then AT&T and its competitors will be equally able to bid for that customer's bundled business.

I would, however, define "new" number as "brand new," not merely new as of some date a year before the arrival of number portability. The majority's definition of "new" number as new on the date of reconsideration appears to me to have no basis in logic. This definition, moreover, may complicate enforcement, and could allow the dominant interexchange carrier to continue to leverage customers that begin taking 800 service after the date of reconsideration. In my view, the competitive problems associated with lack of 800 number portability will not evaporate until we finally do have number portability.

I would also have preferred not to decide now whether bundled 800 services should be included in contracts. In the Report and Order, we concluded that until we reach 800 number portability, 800 services should remain under price cap regulation and should not be subject to streamlined tariff review procedures or be included in contract-based tariffs. I see no reason to change this approach now, particularly without further comment to guide the Commission.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
April 13, 1992

Released: April 30, 1992

CERTIFIED MAIL NO. P 897 383 189
RETURN RECEIPT REQUESTED

The Computer Force
1001 S. Florida Avenue
Lakeland, Florida 33803

Re: Notice of Forfeiture issued to The Computer Force on May 21, 1991.
3153222-91002
TP-9000360

Attention: Rod Proctor, Sales Manager

Dear Computer Force:

This is in response to your letter of May 23, 1991, to the Federal Communications Commission's (FCC) Tampa, Florida Office. Your letter requested "a review...by higher authority" of a $2,000 monetary forfeiture penalty imposed on The Computer Force, a retail computer store, by the FCC's Tampa Office.

We are treating your request as a Petition for Reconsideration under Section 1.106 of the FCC's rules. 47 CFR Section 1.106. As explained below, we are affirming the $2,000 monetary forfeiture penalty.

Our records show that on August 23, 1990, an FCC inspector posing as a potential customer visited the Computer Force store where personal computers were being marketed. The Computer Force had on display a DFI 386 computer. A salesman explained the features of the computer to the FCC inspector. The salesman also said that "The computer was built there" and could be customized to meet the needs of individual customers. There was no label on the computer indicating that it had been authorized by the FCC.

On October 4, 1990, the FCC's Tampa Office issued a Notice of Apparent Liability for a monetary forfeiture penalty to the Computer Force for willfully violating Section 2.803 of the FCC's rules by offering for the DFI 386 computer without FCC authorization. 47 C.F.R. Section 2.803. The Computer Force responded on October 10, 1990. On May 21, 1991, the FCC's Tampa Office issued The Computer Force a Notice of Forfeiture for a $2,000 monetary forfeiture penalty.

Section 2.803 of the FCC's rules prohibits the marketing, including the displaying and offering for sale, of radio frequency devices that require, but have not received FCC authorization. Personal computers must be authorized by the FCC. The type of authorization that is required is certification. 47 C.F.R. Section 15.3(i) and (s), and 15.101. Sections 2.901 through 2.1065 of the FCC's rules explain the equipment authorization procedures. 47 C.F.R. Section 2.901 - 2.1065. To be FCC authorized, personal computers must meet technical standards designed to promote the efficient use of the radio spectrum and to minimize the possibility that computers will cause interference to other electrical equipment. 47 C.F.R. Section 2.901 and 15.105(b). Furthermore, FCC authorized computers must have a label indicating that they have been authorized. 47 C.F.R. Section 2.925, 2.926 and 15.19. The FCC's authority to impose monetary forfeiture penalties for violations of its rules is contained in Section 503(b) of the Communications Act of 1934. 47 U.S.C. Section 503(b).

We have checked our records in Washington, D.C., and have not found any indication that a personal computer was authorized by the FCC under the name The Computer Force or DFI in August 1990.

The Computer Force in its letters to the FCC stated several reasons why the monetary forfeiture penalty should not be imposed. First, it is claimed that the DFI 386 computer was not offered for sale. The FCC inspector, though, understood that the salesman was trying to sell it to him by explaining the computer's features and stating that it could be customized to meet his individual needs. Furthermore, Section 2.803 of the FCC's rules is violated not only when there is an offer to sell a computer that has not been authorized by the FCC, but when a computer is displayed. The DFI 386 computer was clearly on display in the Computer Force's showroom.

Second, the Computer Force stated that "we receive computers . . . from our vendors to evaluate . . . . We also receive systems which are restricted by our vendors to demonstration only and aren't allowed for resale." However, no evidence was presented that the DFI 386 computer was of this nature. Although Section 2.803 of the FCC's rules allows computers that lack FCC authorization to be displayed if there is a conspicuous notice that the computers have not been authorized by the FCC and may not be offered for sale, this notice was not present with the DFI 386 computer.

Finally, the Computer Force stated that it did not intend to willfully violate the FCC's rules. The FCC's Notice of Apparent Liability charged the Computer Force with a willful violation because the displaying and offering for sale of the computer complied with the definition of the word willful in Section 312(f)(1) of the Communications Act of 1934. Section 312(f)(1) of this Act defines "willful" as "the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission . . . ." 47 U.S.C. Section 312(f)(1). This definition was intended by Congress to apply to the word willful as used in Section 503 of the Communications Act to assess forfeiture penalties, and to be consistent with the FCC's decision in *Midwest Radio-Television Inc.*, 45 FCC 1137 (1963). H.R. CONF. REP. NO. 97-765, 97th Cong., 2d Session (1982), *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 2294-95. Based on the *Midwest Radio-Television* decision, willfulness exists if there is a voluntary act or omission in that a person knew that he was doing the act in question such as displaying or trying to sell a computer. Furthermore, to establish a willful violation, it is not necessary to show that a person knew he was acting wrongfully. *Midwest Radio-Television, Inc.*, 45 FCC at 1141-42.

Please submit the $2,000 monetary forfeiture penalty within 30 days of the receipt of this letter. Payment may be by check or money order payable to the Federal Communications Commission. Please place the number 3153222-91002 on the check and send it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Forfeiture penalties not paid within 30 days may be recovered by the U.S. Attorney in a civil suit. 47 U.S.C. Section 504(a).

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
April 13, 1992

Released: April 30, 1992

CERTIFIED MAIL NO. P 897 383 188
RETURN RECEIPT REQUESTED

Moll-Tex Broadcasting Company
6231 East 100th Street
Tulsa, Oklahoma 74137

Re: Notice of Forfeiture issued to Moll-Tex Broadcasting on September 6, 1991. 3153462-91028

Attention: Mr. Albert J. Moll

Dear Moll-Tex Broadcasting Company:

This is in response to your letters dated September 23 and October 6, 1991, to the Federal Communications Commission (FCC) regarding a $600 monetary forfeiture penalty that had been imposed on you in 1991 by the FCC's Kingsville, Texas Office. Your letters stated that you "would like to appeal payment of the fine to the FCC office in Washington, D.C."

We are treating your request as a Petition for Reconsideration under Section 1.106 of the FCC's rules. 47 CFR Section 1.106. As explained below, we are affirming the $600 monetary forfeiture penalty. We are also requiring payment of a $600 monetary forfeiture penalty that was assessed against Moll-Tex Broadcasting in 1990, but held in abeyance provided that there were no further violations of the FCC's rules.

Our records show that on July 8, 1991, an FCC inspector visited radio station KKKS (formerly KLXQ), Uvalde, TX. Moll-Tex Broadcasting is the FCC licensee of this station. The FCC inspector found that records were missing from the public inspection file, namely, a copy of every application submitted to the FCC and a list of programs that significantly treated community issues. The inspector also found that the station's logs reflected that only one Emergency Broadcast System (EBS) test was sent between the weeks of January 21 and April 8, 1991, and EBS tests were not received for the weeks of February 11, 18, 25; March 11, 25; and April 29, 1991. There was, moreover, no indication in the logs why these EBS tests were not received.

On July 25, 1991, the FCC's Kingsville, Texas Office issued a Notice of Apparent Liability to Moll-Tex Broadcasting for violating Sections 73.3526 and 73.1820(a)(1)(iii) of the FCC's rules. Section 73.3526 requires stations to have in their public inspection file a copy of applications submitted to the FCC, and lists of programs that have significantly treated community issues. 47 C.F.R. Section 73.3526(a)(1), (2) and (9). Section 73.1820(a)(1)(iii) requires stations to enter in a log weekly EBS tests that have been received and transmitted. 47 CFR Section 73.1820(a)(1)(iii). *See also* 47 C.F.R. 73.961. Moll-Tex Broadcasting responded on August 24, 1991. On September 6, 1991, the FCC's Kingsville, Texas Office issued a Notice of Forfeiture to Moll-Tex Broadcasting for a $600 monetary forfeiture penalty. The FCC's authority to impose monetary forfeiture penalties for violations of its rules is contained in Section 503(b) of the Communications Act of 1934, 47 U.S.C. Section 503(b). Moll-Tex Broadcasting then sent an undated letter stating that it could not afford to pay the monetary forfeiture penalty, and attached copies of its 1989 and 1990 corporate tax returns, and monthly operating statements for January through September 1991, to support its claim of inability to pay.

The FCC's records also show that in 1990 Moll-Tex Broadcasting was assessed a $600 monetary forfeiture penalty by the FCC for violating the same rules. The FCC, however, in a letter dated January 9, 1991, held this penalty in abeyance for three years because of Moll-Tex Broadcasting's financial condition provided that the same FCC rules were not violated again.

Moll-Tex Broadcasting in its letters to the FCC states several reasons why the $600 monetary forfeiture penalty should not be imposed for the recent violation. First, you state that you were assured by station employees and a consultant that there was compliance with the FCC's rules. Moll-Tex Broadcasting's reliance on employees and a consultant to achieve compliance with the FCC's rules does not relieve it of its obligation to comply with the FCC's rules. The FCC holds licensees responsible for the acts of their employees and consultants. *E.g., Review of Liability of MTD*, 6 FCC Rcd. 34; 68 RR2d 989 (1991).

Second, you state that the radio station has taken corrective action. However, action to correct violations of the FCC's rules does not nullify a monetary forfeiture penalty. *Station KGVL, Inc.*, 42 FCC2d 258, 259 (1973); *Executive Broadcasting Corporation*, 3 FCC2d 699, 700 (1966).

Finally, you request that the monetary forfeiture penalty not be imposed because of "the poor financial status of the stations" although "financially, the station is slowly improving." It appears that the FCC's leniency in holding in abeyance the $600 monetary forfeiture penalty imposed in 1990 for the same rule violations did not achieve the enforcement goal of encouraging compliance with the FCC's rules. The FCC views repeated or uncorrected violations of the FCC's rules as a serious matter, and an enforcement problem where a monetary forfeiture penalty is clearly warranted The $600 monetary forfeiture penalty, therefore, is upheld for the July 1991, repeated violation of the FCC's rules.

Regarding the $600 monetary forfeiture penalty imposed in 1990, the FCC stated in its January 9, 1991, letter to you that this forfeiture would be held in abeyance if there were no further violations of the same rules, and that if these rules were violated, you would be obligated to pay this $600 penalty as well as any additional penalties for the same rule violations. Since Moll-Tex Broadcasting was found to be violating the same rules during the FCC's inspection on July 8, 1991, payment of the $600 monetary forfeiture penalty imposed in 1990 is now required.

Please submit two $600 monetary forfeiture payments within 30 days of the receipt of this letter. Payment may be by check or money order payable to the Federal Communications Commission. Please place the number 3153462-91028 on the check for the 1991 violation, and the number 3153462-90021 on the check for the 1990 violation and send the two checks to:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

Monetary forfeiture penalties not paid within 30 days may be recovered by the U.S. Attorney in a civil suit, 47 U.S.C. Section 504(a).

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
April 13, 1992

Released: April 30, 1992

CERTIFIED MAIL NO. P 295 670 775
RETURN RECEIPT REQUESTED

Segars Communications, Inc.
Radio Station WVOM (AM)
311 Eastport Street
Iuka, Mississippi 38852

Re: Notice of Forfeiture issued to Segars Communications on March 12, 1991.
3153403-91035

Attention: Mr. Bill McLain, Station Operator

Dear Segars Communications:

This is in response to your Petition for Reconsideration received April 4, 1991, and your certified letter received November 12, 1991, which provided tax returns for 1988, 1989 and 1990. Your Petition for Reconsideration related to a $1,300 monetary forfeiture penalty that the Federal Communications Commission's (FCC) New Orleans Office imposed on Segars Communications in a Notice of Forfeiture dated March 12, 1991, for violating Sections 73.932(b) and 73.961(c) of the FCC's rules. 47 C.F.R. Section 73.932(b) and 73.961(c) (Emergency Broadcast System rules). The FCC in a letter to you dated October 15, 1991, affirmed the monetary forfeiture penalty. You then submitted tax returns to document your claim of inability to pay.

Section 503(b)(2) of the Communications Act of 1934 directs the FCC to take into consideration ability to pay in assessing monetary forfeiture penalties. 47 U.S.C. Section 503(b)(2). Based on this consideration, the $1,300 monetary forfeiture penalty is held in abeyance for three years from the date of this letter. If during that period, the same rules are not violated, there will be no obligation to pay the monetary forfeiture penalty assessed for each rule violation. However, if one or more of the violations should occur again during this period, Segars Communications will be obligated to pay the monetary forfeiture penalty imposed by this forfeiture proceeding for the rule that was violated, as well as any additional forfeitures for the new violation.

By holding the forfeiture in abeyance, the FCC seeks to achieve its enforcement goals while making allowance for Segars Communications current financial condition. When a person accepts a broadcast license from the FCC, that person takes on the responsibility to comply with the FCC's rules. Please exercise care in the future to comply with these rules. The FCC takes very seriously its duty to enforce its rules.

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
April 13, 1992

Released: April 30, 1992

FEDERAL EXPRESS NO. 400-2438 7646

Nexus Engineering Corporation
7000 Lougheed Highway
Burnaby, British Columbia
V5A 4K 4
Canada

Re: Notice of Forfeiture issued to Nexus Engineering Corporation on September 5, 1991. 3153107-91013

Attention: Dave Wood, Director of Sales

Dear Nexus Engineering:

This is in response to your request for a "Higher Level Review" dated September 23, 1991, and submitted to the Federal Communications Commission's (FCC) Buffalo, New York Office. You requested review of a $2,000 monetary forfeiture penalty that had been assessed against Nexus Engineering Corporation (Nexus) by the FCC's Buffalo Office.

The FCC's Buffalo Office forwarded your request to the FCC's Field Operations Bureau in Washington, D.C. We are treating your request as a Petition for Reconsideration under Section 1.106 of the FCC's rules. 47 C.F.R. Section 1.106. As explained below, we are affirming the $2,000 monetary forfeiture penalty.

Our records show that Nexus has been marketing under its name an 18 GHz PC LINC microwave interconnect system designed for use by Cable TV systems to transmit from their master headend site to a number of receiver locations. On April 5, 1991, Nexus wrote the FCC's Authorization and Evaluation Division that "I was well aware that we would be unable to send product to a U.S. customer without type acceptance. However, I was unaware of the rules regarding various sales and marketing activities . . . . To date, we have run one advertisement in Private Cable Magazine . . . . We have also mailed about 50 information packages to customers . . . ." Nexus further stated that in the future "we will clearly state in any communication to our customer base that we will not deliver any of these products prior to type acceptance." Nexus then sent the FCC a FAX message which was received on April 10. This FAX stated "Am I correct in understanding that we can proceed with normal sales and marketing activities provided that the appropriate statement (Subpart I - Section 2.803) [a statement explaining that a device may not be offered for sale until approved by FCC] is included with all written correspondence???" The FCC's Equipment Authorization Branch responded in a letter dated April 11, 1991, that "if you are asking whether you may take orders for, or distribute the equipment in the United States pending authorization by the Commission, the answer is 'no' . . . . [T]he device . . . may not be made available for sale, offered for sale or lease, or sold or leased until the approval of the FCC has been obtained."

On May 2, 1991, the FCC received from a cable TV system in the United States a copy of correspondence that had been sent to it by Nexus. The cover letter from Nexus was dated April 26, 1991, and stated in part "I am pleased to provide you with pricing for the Nexus PC LINC microwave interconnect system . . . . I look forward to supplying this equipment to you in the very near future . . . ." Attached was a sheet quoting prices that was also dated April 26, 1991. At the bottom of the price sheet there was a statement that quoted prices are "valid for 30 days."

There is no indication in this correspondence that Nexus would not offer its microwave interconnect system for sale until it had been approved by the FCC. The reasonable interpretation is that Nexus was offering its system for immediate sale.

On May 7, 1991, the FCC received from Nexus an application for FCC authorization of the Nexus microwave interconnect system. This authorization was granted on June 11, 1991.

The FCC's Buffalo Office issued Nexus on July 16, 1991, a Notice of Apparent Liability for violating Section 2.803 of the FCC's rules because Nexus "on or about April 26, 1991 marketed an 18 GHz PC LINC microwave interconnect system without the disclaimer paragraph required by Section 2.803 of the Rules" and without FCC authorization. 47 C.F.R. Section 2.803. Nexus responded on July 29. On September 5, 1991, the FCC's Buffalo Office issued Nexus a Notice of Forfeiture for a $2,000 monetary forfeiture penalty.

Section 2.803 of the FCC's rules prohibits the marketing of radio frequency devices that require, but have not received FCC authorization. Marketing includes selling, offering for sale, advertising and distributing for the purpose of selling. Sections 2.901 through 2.1065 of the FCC's rules explain the equipment authorization procedures. 47 C.F.R. Sections 2.901 - 2.1065. To be FCC authorized, radio frequency devices must meet technical standards designed to promote the efficient use of the radio spectrum and to minimize the possibility that they will cause interference to other electrical equipment. These standards are, in part, based on international agreements. 47 C.F.R. Section 2.901. However, radio frequency devices that lack FCC authorization may be advertised and displayed if the advertisement "contains" a conspicuous notice that the devices have not been authorized by the FCC and may not be offered for sale until authorized by the FCC. 47 C.F.R. Section 2.803. The FCC's authority to impose monetary forfeiture penalties for violations of its rules is contained in Section 503(b) of the Communications Act of 1934, 47 U.S.C. Section 503(b).

Nexus in its letters to the FCC states several reasons why a monetary forfeiture penalty should not be imposed. First, Nexus states that "The purpose of our [marketing] activity was simply to make our clients aware of our intention to be able to supply [them] with this new technology." However, the correspondence from Nexus to a potential customer dated April 26, 1991, went beyond this and was an offer to sell. The correspondence stated that Nexus looks "forward to supplying this equipment to you in the very near future," and quoted prices that Nexus would accept for the equipment which were valid for only 30 days. The quotation of prices reflects an intent to offer an item for sale and to accept orders. The correspondence was transmitted by FAX and the cover sheet states that the correspondence consists of three pages. These three pages

do not "contain" a "conspicuous notice" that Nexus does not intend to sell the equipment until it receives FCC authorization.

Second, Nexus states that it took corrective action such as obtaining FCC authorization for the equipment. However, remedial action to correct a violation, although commendable, does not nullify a forfeiture penalty. *E.g., Station KGVL, Inc.*, 42 FCC2d 258, 259 (1973); *Executive Broadcasting Corp.*, 3 FCC2d 699, 700 (1966).

Third, Nexus explains "that we were simply unaware of the specifics of the Rule Making." However, unfamiliarity with an FCC rule does not excuse a violation of the rule. *E.g., Triad Broadcasting Co., Inc.*, 96 FCC2d 1235, 1242; 55 RR2d 919, 924 (1989). A violation of an FCC rule, moreover, may occur "irrespective of any intent to violate any . . . rule or regulation of the Commission . . . ." 47 U.S.C. Section 312(f)(1). In other words, to establish a violation of an FCC rule, it is not necessary to show that a person knew he was acting wrongfully. *Midwest Radio-Television, Inc.*, 45 FCC 1137, 1141-42 (1963).

Finally, Nexus claims that it should not be subject to a monetary forfeiture penalty because it had a "proposed agreement" with AML Specialties Inc. to market its 18 GHz product line under AML's name "prior to our private labelled version receiving type acceptance." The private labelled product line would be marketed "under the Nexus name." Thus, Nexus states that its "marketing activities that are now in question were based on having access to AML's type accepted products. Therefore, we were operating within FCC guidelines." There are several problems with this reasoning. First, Nexus has provided a copy of a letter reflecting that it informed AML on April 1 that because of "limited progress that we have made in establishing an agreement between our two companies," Nexus would not market AMLs product line. The marketing violation subject to the FCC's penalty occurred on or about April 26. Nexus, therefore, no longer anticipated marketing AML's product when the violation occurred. Second, it appears that Nexus never reached a final agreement with AML, and its marketing plans, therefore, were based on speculation. Third, and most important, the violation involved marketing a product under the Nexus name. The product was not marketed under AML's name. As Nexus seems to have understood based on its above statements, if there is a change in the name or identification of equipment which has been authorized by the FCC, the equipment may not be marketed until the FCC has authorized the equipment under the new name. 47 C.F.R. Section 2.929 and 2.933.

The FCC routinely issues a monetary forfeiture penalty when a person markets an electronic device that has not been authorized by the FCC. A $2,000 forfeiture was usually imposed when this violation occurred, and this amount is authorized by Section 503(b)(2) of the Communications Act of 1934. The FCC recently increased the amounts of its monetary forfeiture penalties and now assesses a $7,000 forfeiture for recent violations of its authorization rules. *Policy Statement in the Matter of Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending.*

Please submit the $2,000 (U.S. dollars) monetary forfeiture payment within 30 days of the receipt of this letter. Payment may be by check or money order payable to the Federal Communications Commission. Please place the number 3153107-91013 on the remittance and send it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Forfeitures not paid within 30 days may be recovered by the U.S. Attorney in a civil suit. 47 U.S.C. Section 504(a).

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
April 13, 1992

Released: April 30, 1992

CERTIFIED MAIL NO. P 295 670 776
RETURN RECEIPT REQUESTED

John Wayne Company
P.O. Box 839
Mount Vernon, Texas 75457

Re: Notice of Forfeiture issued to John Wayne Company on June 27, 1991.
DL-91-227
3153404-91072

Attention: Mr. J. Wayne Morris

Dear John Wayne Company:

The Federal Communications Commission's (FCC) Dallas Office issued a Notice of Forfeiture to John Wayne Company for a $2,000 monetary forfeiture penalty on June 27, 1991, for failure to comply with the FCC's rules regarding the lighting of radio antenna structures. This penalty was affirmed on November 26, 1991 by the FCC's Field Operations Bureau, Washington, D.C. However, because of additional information recently received, we are canceling this monetary forfeiture penalty provided that John Wayne Company submit its license KAD 6019 for cancellation.

The monetary forfeiture penalty was imposed because it was understood that you were licensed (KAD 6019) on and using a repeater operated by Ronny's Communications at a tower near Mount Pleasant that violated the FCC's rules. Although our records show that this license was renewed in 1988, our records also show that you were licensed (WNAL 261) in 1989 to operate from a repeater located on a different radio antenna structure. We also have some evidence that you were no longer operating from the Mount Pleasant tower at the time of the violation, and, instead, were operating from the new antenna. If you were no longer using the first license (KAD 6019), you should have had it canceled.

Since it appears that you were no longer operating from the Mount Pleasant tower at the time of the violation, the $2,000 monetary forfeiture penalty imposed on you for the Mount Pleasant violation is canceled provided that you submit license KAD 6019 to the following address with a request that your license be canceled:

Private Radio Bureau Licensing Division
Federal Communications Commission
1270 Fairfield Road
Gettysburg, Pennsylvania 17325-7245

A copy of this request should also be submitted to the FCC's Dallas Office at the following address:

Federal Communications Commission
9330 LBJ Freeway
Room 1170
Dallas, Texas 75243-3429

If the monetary forfeiture penalty, or a portion of it, has been paid, you may request a refund by submitting a written request to me. Please attach a copy of your letter requesting cancellation of license KAD 6019.

The FCC takes very seriously its duty to enforce its rules. Please exercise caution that John Wayne Company complies with the FCC's rules.

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

cc: Ronny's Communications
Attention: Barbara Deaton
P.O. Box 123
Winnsboro, Texas 75494

Federal Communications Commission
9330 LBJ Freeway
Room 1170
Dallas, Texas 75243-3429

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Sections 0.251
and 1.115 of the Commission's
Rules.

ORDER

Adopted: April 16, 1992; Released: April 30, 1992

By the Commission:

1. By this *Order*, the Commission adopts minor clarifying amendments to sections 0.251 and 1.115 of the Commission's Rules, 47 C.F.R. §§ 0.251 and 1.115.

2. We are amending section 0.251(f)(12), relating to the timely disposition of applications for review of routine comparative decisions involving applications for new facilities. The amendment will make clear that, as we contemplated, the new procedures for timely disposition of comparative cases apply to the Commission's review of exceptions filed directly with the Commission as well as to the review of matters coming before us following a decision by the Review Board. *See Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 164 (1990).

3. We are also amending our rule concerning review of dispositions by the Review Board of interlocutory appeals filed as a matter of right pursuant to 47 C.F.R. § 1.301(a). The rule states that an application for review of such interlocutory Review Board rulings "may" be filed separately with the Commission after such ruling rather than as part of an application for review of the Review Board's final decision. *See* 47 C.F.R. § 1.115(e)(1); *see also Amendment of Sections 1.115, 1.245, and 1.301 of the Commission's Rules and Regulations Regarding Review of Motions to Disqualify Presiding Officer*, 5 FCC Rcd 5366 (1990). The word "may" was intended to inform parties that an application for review of a denial by the Review Board of a such an appeal was permissible, and not to afford such parties a choice of filing an application for review either at the time of the Review Board's interlocutory ruling or after its final decision. In order to clarify this ambiguity, we are amending section 1.115(e)(1) to remove any doubt that such an application for review must be filed, if at all, immediately following the Review Board's interlocutory ruling.

4. Accordingly, IT IS ORDERED that sections 0.251(f)(12) and 1.115(e)(1) of the Commission's Rules are amended as set forth in the Appendix, effective upon publication in the Federal Register.[1]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

47 C.F.R. Parts 0 and 1 are amended as follows:

1. The authority citation for Part 0 continues to read as follows:

Authority: Section 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, 225, unless otherwise noted.

2. 47 C.F.R. § 0.251 is amended by revising paragraph (f)(12) to read as follows:

Part 0 - COMMISSION ORGANIZATION

General Counsel

§ 0.251 Authority delegated

* * * * *

(f) * * *

(12) In preparing decisions for Commission consideration:

(i) On applications for review of routine broadcast comparative cases involving applicants for only new facilities or

(ii) When exceptions to Initial Decisions are filed directly with the Commission the General Counsel will make every effort to submit such draft decisions for Commission consideration within four months of the filing of the last responsive pleading. If the Commission is unable to adopt a decision in such cases within five months of the last responsive pleading, it shall issue an order indicating that additional time will be required to resolve the case.

* * * * *

3. The authority citation for Part 1 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement 5 U.S.C. 552, unless otherwise noted. 47 C.F.R. § 1.115(e)(1) is amended by revising the last sentence to read as follows:

§ 1.115 Application for review of action taken pursuant to delegated authority

* * * * *

(e)(1) * * * Applications for review of interlocutory rulings made by the Review Board (*see* §§ 0.365(b), 1.301(b)) shall be filed only as part of the application for review of the Board's final decision, except that applications for review of rulings by the Board pursuant to § 1.301(a) must be filed separately after such ruling by the Board.

* * * * *

FOOTNOTE

[1] Because these rule changes are a matter of agency organization, practice or procedure, a notice and comment proceeding is not required, 5 U.S.C. § 553(b)(A), and the rule changes may be made effective upon publication in the Federal Register. *See* 5 U.S.C. § 553(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

PZ ENTERTAINMENT
PARTNERSHIP, L.P.

For Modification of Facilities of Station KBBL(TV), Big Bear Lake, CA — File No. BMPCT-880915KF

For Construction Permit for a New Television Booster Station near Fawnskin, CA — File No. BPUB-880727NC

MEMORANDUM OPINION AND ORDER

Adopted: April 16, 1992; Released: April 30, 1992

By the Commission:

1. On February 11, 1991, we denied the above-captioned applications of PZ Entertainment Partnership, L.P. (PZ) for modification of the facilities of unbuilt Station KBBL(TV), Channel 59, Big Bear Lake, California and for a new television booster station to operate on the same channel near Fawnskin, California. *PZ Entertainment Partnership, L.P.*, 6 FCC Rcd 1240 (1991). We now have before us for consideration PZ's March 29, 1991 petition for reconsideration of that action. PZ's petition is opposed by Gulf-California Broadcast Company, Inc. (Gulf), the licensee of Station KESQ-TV (Channel 42, ABC), Palm Springs, California, which also previously opposed PZ's applications.

2. In our previous opinion, we set out the background of this case in some detail, and we need not repeat that here. To summarize, the community of Big Bear Lake lies in a deep valley that is surrounded by mountains, and the critical issue here involves PZ's inability to find a site that it considers economically viable and would provide a line-of-sight from the antenna to Big Bear Lake, as required by Section 73.685(b) of our Rules. Accordingly, PZ sought to locate its primary facility at a site it considers economically viable, while providing service to Big Bear Lake via an on-channel television booster on Bertha Peak, west of Big Bear Lake, to boost the signal into the valley. The above-captioned applications reflect this proposal. Additionally, PZ requested waiver of Section 73.685(b) of the Rules. On February 11, 1991, we denied PZ's applications to utilize a secondary source like an on-channel booster to demonstrate compliance with Section 73.685 of the Rules and the Commission's policies implementing Section 307(b) of the Communications Act. In that connection, we noted that line-of-sight could be obtained if PZ located the transmitter on the valley floor. While PZ argued that such a station would not be economically viable, we stated that we are not the guarantor of financial success of our licensees. We further concluded that it would be inappropriate to waive our rules to permit such a major departure from our licensing standards solely on the economic grounds submitted by PZ. Consequently, we denied PZ's applications for modification of facilities and for a new booster station. Because of the time needed to consider fully these matters, however, we granted PZ's application for an extension of time to construct the station. PZ has now sought reconsideration of that portion of our decision denying its modification proposal.

3. In support of its petition for reconsideration, PZ argues that we failed to weigh the public interest justifications of its proposal. In that connection, it notes that, despite the fact that principal-community coverage would be accomplished by use of a booster, the actual coverage proposed to the entire Big Bear Valley by use of an on-channel booster is as good as that required by our Rules. PZ adds that its proposal is not its first choice, but represents instead a practical solution to a difficult problem. Moreover, PZ argues that it is inappropriate for the Commission first to allot a channel to Big Bear Lake and then to abandon a permittee trying to utilize it in the face of massive geographic and environmental obstacles. PZ further rejects our suggestion of a lower power operation on the valley floor on the basis that such a facility would not be economically viable. Additionally, it contends that if it operated a low power television station, it would have no obligation to provide any local service addressing the needs of Big Bear Lake, unlike a full-power operation. PZ also reiterates the applicability of *WSTE-TV, Inc. v. FCC*, 566 F.2d 333 (D.C. Cir. 1977), *on remand*, 75 FCC 2d 52 (1979), *recon. denied*, 79 FCC 2d 349 (1980), which involved the issue of whether the Commission must consider the use of a secondary service to cure a station's signal strength deficiencies. Accordingly, PZ concludes that grant of its proposal would serve the public interest without causing a major departure from our rules and policies.

4. While we recognize that PZ's proposal may not be its first choice and is an alternative to the establishment of a station in Big Bear Lake, it does not diminish our concern that a secondary source like an on-channel booster be allowed to demonstrate compliance with the Commission rules and policies implementing Section 307(b). Indeed, we have long held that compliance with our licensing rules is premised, in large part, on the selection of a site that will result in the requisite principal-community signal being provided to the community of license. *See, e.g., Suburban Community Policy, Berwick Doctrine, and De Facto Reallocation Policy*, 93 FCC 2d 436 (1983), *recon. denied*, 56 RR 2d 835 (1984). PZ has failed to demonstrate that there are no sites from which it could provide television service to Big Bear Lake in compliance with our rules or, at least, with a less extreme departure from them. For example, PZ entirely discounts the possibility of locating a tower on the valley floor. While we recognize that a tower situated there may not provide coverage outside the valley, we still believe the community of Big Bear Lake might benefit from a lower power television station.[1] While PZ has claimed that such an operation would not be profitable, we reiterate our previous statement that we

[1] This does not suggest that PZ was compelled to select a low power television facility, which has no local service obligations.

cannot be the guarantor of the financial success of our licensees. Further, the Big Bear Lake channel was added to the Television Table of Allotments as a result of a rulemaking petition in which the petitioner asserted, among other things, that a transmitter site existed that would meet Commission requirements. If that is, in fact, not true, we do not believe the proper course of action is to waive basic licensing policies.[2] We note in that regard that PZ was aware of the site problem at the time it acquired the permit.

5. As a final matter, we again state the contrast between *WSTE-TV, Inc. v. F.C.C. , supra,*[3] and the case at hand. In *WSTE-TV,* the licensee would have provided principal-community coverage to 78 percent of its city of license, and, on remand, the use of translators was approved to furnish the signal to the other 22 percent. 75 FCC 2d at 53. Here, PZ would provide no principal-community coverage at all and relies totally on the booster for the requisite signal. As we stated in our previous decision, we believe it is inappropriate to use the potential unprofitability of a station as a basis for waiving compliance with our rules in an application proceeding. Although, as a general matter, we would like to provide some off-the-air television service to Big Bear Lake, we cannot waive rules to permit such a major departure from our licensing standards solely on the economic grounds submitted by PZ.

6. We are not persuaded that the facts and arguments advanced on reconsideration are sufficient to cause us to modify our earlier ruling, which is hereby AFFIRMED. Accordingly, the petition for reconsideration IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[2] We note that more than 12,000 persons in Big Bear Lake now receive cable television service and that local radio service is available from stations KBBU(AM) and KTOT(FM).

[3] In that case, the Court merely required the Commission to consider the merits of the translator proposal weighed against any reasons for dismissing the application on procedural grounds. In our previous decision in this case, we considered fully the merits of PZ's booster proposal.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Revocation of License of

SANDRA V. CRANE
Amateur Radio Station
N6TFO

and

Suspension of License of

SANDRA V. CRANE
Amateur Extra Class Radio Operator License

and

Revocation of License of

CHARLES P. PASCAL
Amateur Radio Station
WB6CIY

and

Suspension of License of

CHARLES P. PASCAL
Amateur Extra Class
Radio Operator License

ORDER TO SHOW CAUSE AND SUSPENSION ORDER

Adopted: April 23, 1992; Released: April 24, 1992

By the Chief, Special Services Division, Private Radio Bureau:

1. It appears that the respondents, Sandra V. Crane and Charles P. Pascal, were the operators of the California Amateur Radio School in Los Angeles, California, at all times pertinent to this proceeding. Further, it appears that Pascal, Crane, or both gave instruction to students of the school prior to the administration on August 4, August 24, and September 14, 1991, of amateur service license examinations. Last, it appears that the respondents, prior to the administration of the examinations, had information that they used to tailor the content of their instruction at the school to include answers to all or most of the questions that would later be part of the examinations, while excluding from instruction the answers to most questions that would not be part of the examinations. This last-described action by respondents constitutes an apparent willful and repeated violation of Section 97.17(e) of the Commission's Rules, 47 C.F.R. § 97.17(e).[1]

2. Additionally, it appears that Crane willfully and repeatedly violated Section 97.17(e), as well as Sections 97.515(d) and 97.517 of the Commission's Rules, 47 C.F.R. §§ 97.515(d)[2] and 97.517,[3] by administering amateur service license examinations to her daughter, Tracey L. Gullotti, on November 12, 1990, January 6, 1991, and April 12, 1991. It also appears that Pascal, by coadministering the November 12, 1990, examination, also willfully violated Sections 97.17(e) and 97.517.[4]

3. In light of Crane's and Pascal's apparent violations of the Commission's Rules, we propose to revoke their amateur service station licenses and are suspending their operator licenses, effective as of the dates described below in paragraphs 4 and 5. Section 312(a)(2) of the Communications Act of 1934, as amended (Communications Act), 47 U.S.C. § 312(a)(2), authorizes the Commission to revoke a given station license on the basis of matters coming to the Commission's attention which would have prevented granting the original application for the license. Section 312(a)(4) of the Communications Act, 47 U.S.C. § 312(a)(4), authorizes the Commission to revoke a station license for willful or repeated violation of the Commission's Rules. Section 303(m)(1)(A) of the Communications Act, 47 U.S.C. § 303(m)(1)(A), authorizes the Commission to suspend a radio operator license for violation of the Commission's Rules.

4. Crane and Pascal ARE ORDERED, under Sections 312(a)(2) and (4) and 312(c) of the Communications Act, 47 U.S.C. §§ 312(a)(2), (4) and 312(c), TO SHOW CAUSE why the captioned amateur service radio station licenses should not be revoked. If Crane, Pascal, or both wish to present evidence at an evidentiary hearing before an Administratives Law Judge, they must individually request a hearing within 30 days after receiving this order. If a hearing is requested, a time, place, and presiding Administrative Law Judge will be designated in a subsequent order. If Crane, Pascal, or both do not request a hearing, the Commission will consider any written statement from each respondent not requesting a hearing and will determine, without a hearing, whether revocation is warranted.

5. Additionally, Crane's and Pascal's captioned operator licenses ARE SUSPENDED under Section 303(m)(1)(A) of the Communications Act, 47 U.S.C. § 303(m)(1)(A), for the remainder of the license terms, effective as indicated in this paragraph. If either respondent requests a hearing or submits a written statement concerning the suspension,

[1] Section 97.17(e) provides: "No person shall obtain or attempt to obtain, or assist another person to obtain or attempt to obtain, an operator license or reciprocal permit for alien amateur licensee by fraudulent means."

[2] Section 97.515(d) provides: "No VE may administer an examination to that VE's spouse, children, grandchildren, stepchildren, parents, grandparents, stepparents, brothers, sisters, stepbrothers, stepsisters, aunts, uncles, nieces, nephews [or] in-laws."

[3] Section 97.517 provides: "No VE may administer or certify any examination by fraudulent means or for monetary or other consideration including reimbursement in any amount in excess of that permitted. Violation of this provision may result in the revocation of the VE's amateur station license and the suspension of the VE's amateur operator license."

[4] *See* notes 1 and 3, *supra*.

that respondent's suspension will be held in abeyance until the matter is decided. If either respondent does not request a hearing or submit a written statement, that respondent's suspension will take effect 30 days after his or her receipt of this order.

6. The captioned proceedings appear to be based on related facts and on substantially the same issues. It therefore appears that consolidation of these proceedings will best serve the proper dispatch of business and the ends of justice.[5] The captioned proceedings ARE THEREFORE CONSOLIDATED. This matter will be decided upon the following issues:

(a) To determine whether the respondents willfully or repeatedly violated Section 97.17(e) of the Commission's Rules in connection with examinations administered on August 4, August 24, or September 14, 1991, or on any combination of these dates.

(b) To determine whether respondent Sandra V. Crane willfully or repeatedly violated Section 97.17(e), 97.515(d), or 97.517, or any combination of these sections, of the Commission's Rules in connection with examinations administered on November 12, 1990, January 6, 1991, or April 12, 1991, or on any combination of these dates.

(c) To determine whether respondent Charles P. Pascal willfully violated Section 97.17(e) or 97.517, or both, of the Commission's Rules in connection with an examination administered on November 12, 1990.

(d) To determine whether each respondent is qualified to remain a Commission licensee.

(e) To determine whether one or both of the captioned radio station licenses should be revoked.

(f) To determine whether the suspension of each of the captioned operator licenses should be affirmed, modified, or dismissed.

A form and a return envelope, intended to be of aid in replying to this order, are being supplied to each of the respondents simultaneous to the delivery of this order.

FEDERAL COMMUNICATIONS COMMISSION

Robert H. McNamara
Chief, Special Services Division
Private Radio Bureau

[5] *See* Section 1.227(a)(1) of the Commission Rules, 47 C.F.R. § 1.227(a)(1); *see also* Sections 4(i) and (j) of the Communications Act, 47 U.S.C. §§ 154(i), (j).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

LAMOILLE BROADCASTING AND COMMUNICATIONS GENERAL PARTNERSHIP — File No. BPH-871230MJ

For Construction Permit
for a New FM Station on Channel 239A
in Morrisville, Vermont

MEMORANDUM OPINION AND ORDER

Adopted: April 16, 1992; Released: April 30, 1992

By the Commission:

1. The Commission has under consideration an Application for Review ("Application") filed on February 19, 1991, by Lamoille Broadcasting Communications General Partnership ("Lamoille"). By way of background, Lamoille's application for a construction permit for a new commercial FM station in Morrisville, Vermont, was returned by the Mass Media Bureau ("Bureau") as not sufficient for tender, because its transmitter site map did not show along the printed margins of both axes at least two coordinate markings, specifically labelled by the U.S. G. S., one on either side of the marked site.[1] *See Letter to Lamoille Broadcasting and Communications General Partnership from the Chief, FM Branch, Audio Services Division*, March 15, 1988 (reference 8920-CJS). On April 15, 1988, Lamoille sought reconsideration. Its Petition for Reconsideration was denied. *See Letter to Lamoille Broadcasting and Communications General Partnership from the Chief, Audio Services Division*, January 10, 1991 (reference 8920JD). Lamoille seeks review of the Bureau's decision on reconsideration, acceptance of a curative amendment, and acceptance of its application.

2. In its Petition for Reconsideration, Lamoille asserted that: (i) its transmitter site map contained one axis as well as both of the required coordinate markings in the form of cross hairs on each side of the indicated site; (ii) its consultant drew lines connecting the U.S.G.S. hatch marks on top of the hatch marks themselves, perhaps rendering them difficult to discern but not negating the fact that they were there, as required; and (iii) the site map, read in conjunction with a different map depicting the station's proposed signal contours, is sufficient to enable ascertainment of the site coordinates. Lamoille also stated that any error was caused in part by an ambiguity in the *Public Notice*, and that the interpretation of its engineering consultant was "reasonable." In any event, Lamoille stated that the "drastic" action of dismissal was unwarranted.

3. In denying the reconsideration petition, the Bureau first noted that Lamoille's site map did not contain the original U.S.G.S.-labeled longitude coordinate markings, and that no reduced portion of the entire map was submitted which would have allowed verification of the specified longitude reference markings. Additionally, the Bureau noted that, due to the small scale of the sectional aeronautical chart used for the contour map, it could not confidently and reliably verify the coordinate markings. The Bureau further noted that a curative amendment was unacceptable, because it was submitted by Lamoille after the close of the applicable filing window and was thus prohibited by 47 C.F.R. § 73.3522(a)(6).

4. Lamoille, in support of its Application for Review, maintains that the Bureau failed to respond to its petition for reconsideration in several respects. First, Lamoille states that the Bureau did not address Lamoille's claim that the *Public Notice* was ambiguous and that its consultant's interpretation of the public notice was reasonable. Lamoille also notes that the Bureau pointed to no source of clarification for the ambiguity. Lamoille acknowledges that the Bureau indicated its staff could not verify the coordinate markings with the requisite degree of confidence and reliability using Lamoille's contour map, due to the small scale of the map. Lamoille contends, however, that the Bureau did not explain why additional verification was required, since site elevation could be read from the site map, the site coordinates were consistently specified in other parts of the application, and the site map was labeled by its engineering consultant using U.S.G.S. hatch marks as reference points. Lamoille contends that, ultimately, its application was not returned for the reasons stated, but as a "quick and easy means" of reducing an applications processing backlog. Application, at page 4. Lamoille also argues that the "drastic" penalty of dismissal is contrary to the public interest, "unduly harsh given the circumstances," and procedurally unfair. *Id.* Lamoille asserts that the public interest is not served where the dismissal of its application leaves only one remaining applicant, whose allegedly dubious qualifications to be a Commission licensee cannot now be examined in the context of a comparative hearing.[2] Finally, citing *Salzer v. FCC*, 778 F.2d 869 (D.C. Cir. 1985), and *Special Markets Media, Inc.*, 4 FCC Rcd 5753 (1989), Lamoille maintains that, in view of the foregoing assertions, "fairness and equity" dictate that it should be permitted to submit a curative amendment *nunc pro tunc*. Application, at pages 6-7.

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[1] In order to be deemed tenderable pursuant to the FM "hard look" processing standards instituted by the Commission in the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936 (May 13, 1985) (*"Report and Order"*), all commercial FM applications must include a transmitter site map meeting criteria set forth in an April 5, 1985 *Public Notice* (*"Public Notice"*). *See* 51 Fed. Reg. 45,945 (December 23, 1986).

[2] Lamoille asserts that its only competitor "is a retirement-age secretary of the only licensed radio facility in Morrisville.... Given her age, lack of managerial experience, lack of financial wherewithal and educational level, there are serious questions regarding... her integration proposal and good reasons to question" who is the real party-in-interest behind the application. Application, at 4-5. While some such allegations may be raised in the context of a petition to deny or informal objection to that application, they have no bearing here, and will not be considered.

5. We reject Lamoille's claim that the *Public Notice* is ambiguous and that its engineering consultant's interpretation therefore was reasonable.[3] As stated in its petition for (reconsideration at page 3, Lamoille chose the "alternative" site map submission contemplated by the *Public Notice*, which clearly requires: (i) a full scale copy of the map section containing the site, including one margin and two U.S.G.S.-printed cross marks, between which fine lines have been drawn to enclose the site; *and* (ii) a reduced copy of the entire map "to allow the Commission's staff to verify that the lines have been correctly labelled." Lamoille failed to provide the reduced copy of the full-scale map which the *Public Notice* unambiguously requires when the alternative method is employed. Since it is clear that Lamoille chose to employ the alternate method set forth in the *Public Notice*, it appears that, initially, the Bureau staff erroneously assumed, because no reduced copy of the full-scale site map had been provided, that the applicant had chosen to utilize the method which requires that the site map show along the printed margins of both axes coordinate markings specifically labelled by the U.S.G.S. In any event, Lamoille's site map submission was defective, since it does not fully comply with *either* method set forth in the *Public Notice*.

6. Likewise, we reject Lamoille's claim that its application, as submitted, was substantially complete and provided all information necessary for site verification. The Bureau correctly concluded that the application lacked a reduced copy of the entire site map which would have allowed for verification of the specified longitude markings, and that the small scale of the sectional aeronautical chart used for the coverage map made it impossible to confidently and reliably verify the coordinate markings on the site map. Although Lamoille's consultant typed the longitude and latitude markings on the margins of the site map, this fact does not permit independent verification of the site coordinates in the absence of a copy of the entire map.

7. Lamoille further contends that dismissal of its application will deprive Morrisville residents of a choice of broadcast applicants and that the Commission therefore should accept *nunc pro tunc* Lamoille's curative amendment. We disagree. In adopting the FM "hard look" processing system, the Commission was aware that nonconforming applications would be dismissed and that there could occur situations in which only one applicant remained.[4] The Commission's policy of maximizing the pool of applicants from which to select a broadcast licensee by permitting late-filed curative amendments and procedural tardiness was abandoned in connection with the "hard look" processing system, in favor of placing "greater emphasis on providing service to the public in the most efficient, expeditious manner possible. Temporizing with flawed proposals has in the past disserved the public interest by inordinately delaying theinitiation of new service. *Chudy Broadcasting Corporation*, 58 RR 2d 133, 134 n.7." *Star Signal Corporation*, 1 FCC Rcd 405, 406 (1986).[5]

8. Finally, we reject Lamoille's contention that, in view of its other assertions, fairness and equity require that the Commission accept its proffered curative amendment. The *Report and Order* promulgated new processing procedures which, among other things, restrict the period of time within which curative amendments going to the tenderability of applications may be filed. *See* 50 Fed. Reg. at 19,941, 19945; *see also* 47 C.F.R. §§ 73.3522(a)(6) and 73.3564(a). Applicants may perfect the tenderability of their applications only by amendments filed by the close of the applicable window. *See Ann D. Genthner*, 1 FCC Rcd 399 (1986). The Commission has consistently held that the *Report and Order* afforded prospective applicants full notice of the strict "hard look" processing requirements. *See, e.g., Matthew D. Wiggins, Jr.*, 1 FCC Rcd 401

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[3] The *Public Notice* states in pertinent part:

> In order to allow the Commission's processing staff to verify the correctness of the geographic coordinates provided in an application, it is necessary for this site map to show along the printed margin of both axes at least two coordinate markings, specifically labeled by the USGS, one on either side of the marked site. Additionally, a scale of kilometers or miles (kilometers, if available) and all of the identifying map information must be included. The site should be plotted on a full scale map, and all of the contour lines should be clearly visible. Faded, smudged or otherwise illegible maps are unacceptable. Photocopies are acceptable in lieu of actual USGS Maps, provided they are clear, dark and legible. It is not necessary to submit an entire map (although this is perfectly acceptable), but only as much as is necessary to fully comply with the requirements described above.
>
> In certain cases it may be inconvenient to provide a full scale photocopy which includes both the site and the margins. This can occur when the site lies towards the center of the map. In this case the following alternative is acceptable. Provide a full scale copy of the section of the map containing the site. This copy must include either four of the standard printed crossmarks or one margin and two cross-marks. Fine lines should be drawn between the marks in such a fashion as to enclose the site. Each of these lines should be labeled with the appropriate latitude or longitude. This full scale map section must include all the information specified in the previous paragraph. In addition, a reduced copy of the entire map must be included to allow the Commission's staff to verify that the lines have been correctly labeled.
>
> If the above requirements are not met, the application will be returned without further review....

51 Fed. Reg., at 45,945. We note that, throughout Lamoille's pleadings, it characterizes the cross-marks referenced in the *Public Notice* as "hatch marks."

[4] Moreover, the Commission's "first come/first serve" processing system contemplates situations in which *all* applications filed during the pertinent filing window are returned. *See Public Notice*, "Operation of 'First Come/First Serve' FM Broadcast Application Processing System," 51 Fed. Reg. 23,764 (July 1, 1986).

[5] In a recent Notice of Proposed Rule Making in MM Docket No. 91-347, we proposed to modify or eliminate the FM "hard look" processing rules, but stated that any such change would only apply to applications filed after the effective date of the rule changes. *Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Applications*, 6 FCC Rcd 7265 (1991).

(1986). Lamoille's proposal fails to meet those requirements, and we see no equities in this case which warrant a finding of unfairness, ambiguity, or lack of adequate notice. [9]

9. ACCORDINGLY, IT IS ORDERED, That the Application for Review filed on February 19, 1991, by Lamoille Broadcasting and Communications General Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[9] Lamoille's reliance upon *Special Markets Media* is misplaced. In 1984, the Commission provided a protective "buffer zone" of a 16-kilometer (10-mile) radius in addition to the normal distance separation requirements, to existing Class C stations currently operating with antenna heights of less than 300 meters (984 feet) above average terrain for a three-year period commencing April 19, 1984. *FM Broadcast Assignments*, 97 FCC 2d 279 (1984). In *Special Markets Media* we ordered the reinstatement of five applications which had previously been dismissed for failure to protect the buffer zone of nearby Class C stations. We held in *Special Markets Media* that the buffer zone requirement failed to provide a clearly articulated and unambiguously stated standard for acceptance of applications for assignments which conflicted with "buffer zones," citing *Salzer*. As noted above, however, we had earlier expressly found in *Ann D. Genthner* (and several companion cases) that the "hard look" processing guidelines were clearly enunciated and properly adopted.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

RUSSIAN RIVER VINTAGE BROADCASTING — File No. BPH-880519NH

For a Construction Permit
for a New FM Station
on Channel 229A in
Sebastopol, California

MEMORANDUM OPINION AND ORDER

Adopted: April 16, 1992; Released: April 30, 1992

By the Commission:

1. The Commission has before it for consideration a petition for reconsideration filed on August 2, 1990 by Russian River Vintage Broadcasting ("Russian"). Russian seeks reconsideration of the Mass Media Bureau's ("Bureau") action in the Hearing Designation Order dismissing Russian's application for a new FM station in Sebastopol, California. *See Beth Knight*, 5 FCC Rcd 3927 (M.M. Bur. 1990).[1] An opposition was filed on August 6, 1990, by mutually exclusive applicant Bayside Broadcasting, Inc., to which Russian replied on August 20, 1990.

2. Russian submitted its application for a new FM station in Sebastopol, California on May 19, 1988. After an initial review, the application was accepted for filing on August 23, 1988. However, a later technical review of Russian's application revealed that the geographic coordinates for the proposed transmitter site contained in Section V-B, FCC Form 301, conflicted with the coordinates for the proposed transmitter site plotted on the topographic map. Specifically, the staff noted a one minute-four second discrepancy between the coordinates contained in the application and those plotted on the topographic map. The staff pointed out that the inconsistencies in Russian's north latitude coordinates prevented a determination of the veracity of the site availability certification, the environmental impact statement, and the information supplied for FAA approval. Consequently, Russian's application was dismissed as inadvertently accepted for filing.

3. Russian contends in its petition for reconsideration that the site plotted on the map in Section V-B is consistent with the coordinates listed everywhere else in the application and that the staff therefore made an error in reviewing the map. Russian states that the topographic map was vertically cropped to display all four of the borders of the map and the site on an 11 inch by 17 inch photocopy. Russian claims that someone would have to be in a hurry or unfamiliar with the 7.5 minute topographical map to fail to note that the map had been cropped and thus incorrectly conclude that the plotted coordinates were inconsistent with those listed in other parts of the application. Russian further claims that typed on the left margin of the map were the coordinates $38^{0}25'22"$ north latitude, $122^{0}59'05"$ west longitude. Therefore, Russian explains, the north latitude printed by the USGS which appeared on its map at the top edge should not be used to scale off the north latitude of the site marked on the map, but instead, the north latitude typed in the left margin should be used. Additionally, Russian contends that any ambiguity created by failing to note that the map had been cropped could have been confidently resolved using standard engineering methodology "by drawing a line between the 25' markings printed on the left and right margins of Russian's site map and scaling perpendicular measurement from that line to Russian's site using a standard 7.5 minute topographical map ruler." Petition for Reconsideration, at p. 5.

4. The Commission's FM "hard look" policy mandates that applications be substantially complete at filing or they will be returned as not tenderable.[2] In Appendix D to the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19,936, 19,945 (1985), the Commission stated that the critical elements for a substantially complete application include the geographic coordinates of the proposed site, plotted to the nearest second. This information allows the engineering staff to verify the coordinates of the proposed site, the environmental impact of the site and whether there are other nearby communications facilities that should be afforded some level of protection from potential interference. In order to allow the Commission's processing staff to verify the correctness of the geographic coordinates provided in an application, we require the submission of a 7.5 minute USGS topographic map.[3] The map must "show along the printed margin of both axes at least two coordinate markings, specifically labeled by the USGS, one on either side of the marked site." *FM Transmitter Site Map Submissions*, 1 FCC Rcd 381, 382 (1986). Russian admits in its petition for reconsideration that it had cropped the USGS topographic map and altered the coordinate markings to fit the site map on one 11 inch by 17 inch photocopy. Contrary to Russian's assertion that the alteration was readily apparent, the staff did *not* detect that the markings had been altered. Indeed, while Russian clearly indicated that it had cropped one portion of the map by using a "zig-zag" line, the alteration which resulted in uncertainty as to the proper site coordinates was not similarly indicated. Not surprisingly, the staff noted only that a discrepancy existed between the coordinates

[1] There were originally 21 mutually exclusive applicants for the Sebastopol, California station. Russian and another applicant, Apple Communications, were dismissed while the other 19 applicants were designated for hearing.

[2] In a recent Notice of Proposed Rule Making in MM Docket No. 91-347, we proposed to modify or eliminate the FM "hard look" processing rules, but stated that any such change would only apply to applications filed after the effective date of the rule changes. *Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Applications*, 6 FCC Rcd 7265 (1991).

[3] In order to be deemed tenderable pursuant to the FM "hard look" processing standards, all commercial FM applications must include a transmitter site map meeting requirements set forth in an April 5, 1985 *Public Notice* which established the site map criteria. *See* 51 Fed. Reg. 45,945 (December 23, 1986). Russian's application was filed on May 19, 1988.

plotted and those listed in other parts of the application and was unable to confidently determine from the face of the application whether Russian's proposed site coordinates were accurate. The method consistently used by the staff in determining coordinates is based on linear interpolation between two coordinate markings, specifically labeled by the USGS, one on either side of the marked site.[4] By altering the map so that the coordinate markings labeled by the USGS along the north margin of the map no longer corresponded to the true coordinates, Russian prevented the processing staff from accurately verifying the plotted coordinates. Russian contends that use of a topographical map ruler, rather than the interpolation method, would resolve the apparent discrepancy. However, it would not. While adding latitude as indicated by the ruler to the 25 minute coordinate marking immediately *south* of the site would confirm the coordinates listed by Russian in Section V-B ($38^0$25'34"), the equally valid method of subtracting latitude as indicated by the ruler from the altered coordinate marking along the map margin immediately *north* of the site would indicate a discrepancy ($38^0$29'01"). We affirm the Bureau's action.

5. Accordingly, for the foregoing reasons, IT IS ORDERED, That the petition for reconsideration filed August 2, 1990 by Russian River Vintage Broadcasting IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[4] Use of this interpolation method resulted in the staff concluding that the north latitude of the site was $38^0$26'36".*See Beth Knight*, 5 FCC Rcd at 3928.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-14

In the Matter of

Amendment of Section 73.202(b), RM-7884
Table of Allotments,
FM Broadcast Stations.
(Ashland, Wisconsin)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 15, 1992; Released: May 1, 1992

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 935 (1992), proposing the allotment of Channel 227C1 to Ashland, Wisconsin, as that community's second FM broadcast service. The *Notice* was issued in response to a petition filed by the Phoenix Group ("petitioner"). Petitioner filed comments supporting the allotment of Channel 227C1 at Ashland and stated its intention to file an application for the channel if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 227C1 to Ashland, Wisconsin, in order to provide the community with a second FM broadcast service. As indiated in the *Notice*, Channel 227C1 can be allotted to Ashland, Wisconsin, consistent with the Commission's spacing requirements provided there is a site restriction 8.5 kilometers (5.3 miles) northwest of the community.[1] The site restriction will prevent a short-spacing to Station WLDY-FM, Channel 226A, Ladysmith, Wisconsin. Since Ashland is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 15, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Ashland, Wisconsin	227C1, 244C2

4. The window period for filing applications for Channel 227C1 will open on **June 16, 1992,** and close on **July 16, 1992.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 227C1 at Ashland are 46-39-30 and 90-56-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-93

In the Matter of

Amendment of Section 73.202(b), RM-7950
Table of Allotments,
FM Broadcast Stations.
(Fagaitua, American Samoa)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 15, 1992; Released: May 1, 1992

Comment Date: June 22, 1992
Reply Comment Date: July 7, 1992

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Aleki Sene ("petitioner"), seeking the allotment of Channel 276C2 to Fagaitua, American Samoa, as that community's first local FM service. Petitioner states her intention to apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 276C2 to Fagaitua, American Samoa, as that community's first local FM channel. Petitioner states that Fagaitua is located in the Eastern District of Sua County, with a population of 422 persons. Sua County has a population of 1,359 persons.[1] Channel 276C2 can be allotted to Fagaitua in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2]

3. In view of the fact that Fagaitua, American Samoa, could receive its first local FM service the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Fagaitua, American Samoa	--	276C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 22, 1992,** and reply comments on or before **July 7, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John F. Garziglia
Pepper & Corazzini
1776 K Street, N.W., Suite 200
Washington, D.C. 20006
(Attorney for Aleki Sene)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Population figures are taken from the 1980 Census.
[2] The coordinates are South Latitude 14-16-19 and West Longitude 170-36-43.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-315

In the Matter of

Amendment of Section 73.202(b),	RM-6308
Table of Allotments,	RM-6532
FM Broadcast Stations.	RM-7561
(Hawesville and *Hardinsburg, Kentucky; Bloomfield, Huntingburg, Loogootee* and *Scottsburg, Indiana*)	

SECOND REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 15, 1992; Released: May 1, 1992

By the Acting Chief, Allocations Branch:

1. The Commission has before it the *First Report and Order*, 6 FCC 5138 (1991), which dismissed a request to allot Channel 234A to Hawesville, Kentucky, and postponed final disposition of two counterproposals. HIC Broadcasting, Inc. ("HIC"), licensee of Station WHIC, Channel 232A, Hardinsburg, Kentucky, proposed the substitution of Channel 232C2 for Channel 232A at Hardinsburg and the substitution of Channel 231A for Channel 232A at Station WKMD, Loogootee, Indiana (RM-6532).[1] Dubois County Broadcasting, Inc., d/b/a WBDC Radio ("WBDC"), Channel 265A, Huntingburg, Indiana, proposed the substitution of Channel 265B1 for Channel 265A at Huntingburg, Indiana; the substitution of Channel 287A for Channel 265A at Scottsburg, Indiana; the substitution of Channel 266C1 for Channel 266C at Russellville, Kentucky; and the allotment of Channel 234A rather than 264A at Philpot, Kentucky in MM Docket No. 88-126 (RM-7561).[2] River Valley Radio, Inc. ("River Valley"), licensee of Station WRBT(FM), Channel 235B, Mount Carmel, Illinois, filed comments in response to WBDC's counterproposal.

2. We issued an *Order to Show Cause*, 6 FCC Rcd 6473 (1991), to Community Broadcast Service of Loogootee, Inc. ("Loogootee"), licensee of Station WKMD(FM), Loogootee, to demonstrate why its authorization should not be modified to specify operation on Channel 231A in lieu of Channel 232A, as requested by HIC. Loogootee filed no response as to why its license should not be modified. Accordingly, pursuant to Section 1.87 of the Commission's Rules, Loogootee is deemed to have consented to the proposed modification.

3. In response to WBDC's counterproposal, River Valley states that the Commission allotted Channel 234A in lieu of Channel 264A to Philpot, Kentucky in MM Docket No. 88-126, 5 FCC Rcd 2538 (1990), at WBDC's request in order to accommodate WBDC's counterproposal in this proceeding. River Valley argues that the allotment of Channel 234A in lieu of Channel 264A at Philpot was not acceptable, because the Commission failed to consider River Valley's pending application to modify Station WRBT(FM) (BPH-890920IC).[3] This application was mutually exclusive with the allotment of Channel 234A to Philpot. River Valley argues that the Commission is precluded from considering WBDC's counterproposal in this proceeding because it was filed after the deadline for counterproposals in MM Docket No. 88-126. Therefore, it argues, the filing constitutes an untimely counterproposal and is not acceptable in this proceeding. Finally, River Valley also contends that the counterproposal is defective because it requires channel changes for three authorized stations.

4. We find that WBDC's counterproposal is acceptable for consideration. The counterproposal was timely filed in this proceeding.[4] Furthermore, we note that River Valley filed a petition for reconsideration in MM Docket No. 88-126, and we have denied that petition in an action adopted simultaneously with this proceeding. *See Memorandum Opinion and Order* (MM Docket No. 88-126), 7 FCC Rcd _____ (adopted April 15, 1992). Therefore, since the allotment of Channel 234A to Philpot, Kentucky, has been affirmed, we need not explore River Valley's objection to the substitution in this proceeding.

5. We disagree with River Valley's contention that WBDC's counterproposal is defective because it involves channel changes for three authorized stations. Our policy is to not entertain proposals involving more than two substitutions of channels occupied by existing stations unless the petitioner demonstrates that special factors involving significant public interest benefits are present or that an assurance of agreement among the affected stations to the proposal are reached in advance of the filing of the petition. *See Columbus, Nebraska*, 51 Fed. Reg. 4926, February 26, 1986. In this instance, WBDC requested a change in its own frequency, the substitution of one vacant allotment for another vacant allotment at Philpot, the substitution of Channel 287A for Channel 265A at Scottsburg and the modification of the authorization of Station WMPI(FM), Scottsburg, accordingly, and the downgrading of Channel 266C, Russellville, to Channel 266C1. The licensee of Station WMPI(FM), Scottsburg, agreed in advance to the channel change. Furthermore, the Russellville channel class change had been separately proposed, and granted in an uncontested proceeding. *See Report and Order* (MM Docket No. 88-120), 3 FCC Rcd 7030 (1988). Therefore, WBDC's counterproposal complies with our channel substitution policy.

6. Based on the above information, we believe the public interest would be served by the substitution of Channel 232C2 for Channel 232A at Hardinsburg, and the substitution of Channel 265B1 for Channel 265A at Huntingburg,

[1] Public Notice of the counterproposal was given October 7, 1988, Report No. 1752.
[2] Public Notice of the counterproposal was given on August 16, 1991, Report No. 1856.
[3] This application has been dismissed. *See* Letter from Chief, Audio Services Division, to River Valley Radio, Inc., dated March 24, 1992.
[4] Counterproposals in this proceeding were due on August 26, 1988. WBDC filed its counterproposal on that date.

since each proposal would result in the provision of a wide area FM service to the respective communities. Channel 265B1 can be substituted for Channel 265A at Huntingburg, Indiana, in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.2 kilometers (6.3 miles) southeast to avoid short spacings to Station WMGI, Channel 264B, Terre Haute, Indiana, and the site specified in the construction permit (BPH-890710JW) for Channel 266A, Bloomfield, Indiana.[5] Channel 287A can be substituted for Channel 265A at Scottsburg, Indiana, in compliance with the Commission's minimum distance separation requirements, at the site specified by WBDC.[6] Channel 232C2 can be substituted for Channel 232A at Hardinsburg, Kentucky, in compliance with the Commission's minimum distance separation requirements, with a site restriction of 22.3 kilometers (13.9 miles) northeast.[7] The site restriction is necessary to avoid short spacings to Station WDBL, Channel 232A, Springfield, Tennessee, and Station WLAP(FM), Channel 233C1, Lexington, Kentucky. Channel 231A can be substituted for Channel 232A at Loogootee, Indiana, in compliance with the Commission's minimum distance separation requirements, with a site restriction of 8.3 kilometers (5.2 miles) southwest at its current transmitter site.[8] In accordance with Section 1.420(g) of the Commission's Rules, we are modifying the license for Station WBDC(FM) to specify operation on Channel 265B1 at Huntingburg, Indiana, and the license of Station WHIC(FM) to specify operation on Channel 232C2 at Hardinsburg, Kentucky. We are also modifying the license of Station WMPI(FM), Scottsburg, Indiana, to specify operation on Channel 287A in lieu of Channel 265A, and the license of Station WKMD(FM), Loogootee, Indiana, to specify operation on Channel 231A in lieu of 232A.

7. Commission policy requires that each station be reimbursed for the reasonable costs of changing its frequency. HIC has stated its willingness to reimburse Station WKMD(FM), Loogootee, Indiana, and WBDC has stated its willingness to reimburse Station WMPI, Scottsburg, Indiana, for the cost of changing its channel and relocating its tower site. Donald R. Rice, licensee of Station WMPI(FM) has consented to the frequency change and site relocation.

8. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 15, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Hardinsburg, Kentucky	232C2
Huntingburg, Indiana	265B1
Loogootee, Indiana	231A
Scottsburg, Indiana	287A

9. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of HIC Broadcasting, Inc., for Station WHIC(FM), Hardinsburg, Kentucky, IS MODIFIED, to specify operation on Channel 232C2 in lieu of Channel 232A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Dubois County Broadcasting, Inc., d/b/a WBDC Radio, for Station WBDC(FM), Huntingburg, Indiana, IS MODIFIED, to specify operation on Channel 265B1 in lieu of Channel 265A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

11. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Community Broadcast Service of Loogootee, Inc., for Station WKMD(FM), Loogootee, In-

[5] The coordinates for Channel 265B1 at Huntingburg are 38-13-30 and 86-53-00.

[6] The coordinates for Channel 287A at Scottsburg are 38-41-40 and 85-41-10.

[7] The coordinates for Channel 232C2 at Hardinsburg are 37-52-00 and 86-14-00. The Hardinsburg allotment clears six of the seven pending applications for Channel 234A at New Albany, Indiana. Adams Rib, Inc., an applicant for Channel 234A (911115MA), will be permitted to amend its application without loss of cut-off protection. We will serve the applicant with a copy of this *Report and Order*.

[8] The coordinates for Channel 231A at Loogootee are 38-37-09 and 86-58-27.

diana, IS MODIFIED, to specify operation on Channel 231A in lieu of Channel 232A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in license BLH-841217KK except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-841217KK except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

12. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Donald R. Rice for Station WMPI(FM), Scottsburg, Indiana, IS MODIFIED, to specify operation on Channel 287A in lieu of Channel 265A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in license BLH-3531 except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-3531 except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

13. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Community Broadcast Service of Loogootee, Inc.
P.O. Box 155
Loogootee, Indiana 47553
(Licensee of Station WKMD(FM))

Donald R. Rice
3774 North Road 450 West
Kokomo, Indiana 46901
(Licensee of Station WMPI(FM))

John E. Fiorini, III
Mark Van Bergh
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005
(Attorneys for River Valley Radio, Inc.)

Adams Rib, Inc.
P.O. Box 1226
Jeffersonville, IN 47131
(Applicant at New Albany, Indiana 911115MA)

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

15. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-126

In the Matter of

Amendment of Section 73.202(b), RM-6142
Table of Allotments,
FM Broadcast Stations.
(Philpot, Kentucky)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: April 15, 1992; Released: May 1, 1992

By the Chief, Policy and Rules Division:

1. The Commission has before it a petition for reconsideration of the *Report & Order* (*"R&O"*), 5 FCC Rcd 2538 (1990), filed by River Valley Radio, Inc. ("River Valley"), licensee of Station WRBT(FM), Channel 235B, Mt. Carmel, Illinois. The *R&O* allotted Channel 234A at Philpot, Kentucky, as that community's first local FM service. Dubois County Broadcasting, Inc., licensee of WBDC Radio, Channel 265A, Huntingburg, Indiana ("Dubois") filed an opposition, and Ted H. Johnson ("Johnson"), the original Philpot petitioner, filed a motion to dismiss and response. River Valley filed a reply. For the reasons discussed below, we will deny River Valley's petition for reconsideration.

2. *Background.* This proceeding began when the Policy and Rules Division ("Division") issued a *Notice of Proposed Rule Making*, 3 FCC Rcd 1940 (1988) proposing the allotment of Channel 264A to Philpot, Kentucky, as that community's first local FM service, setting a May 26, 1988 deadline for the filing of counterproposals. On May 25, 1988, Dubois filed a counterproposal requesting that Channel 234A be allotted to Philpot in lieu of Channel 264A, and that Channel 253A be allotted in lieu of Channel 234A at Hawesville, Kentucky. The Hawesville allotment had been requested in a petition for rule making in MM Docket 88-315, *see Notice of Proposed Rule Making (Hawesville, Kentucky)*, 3 FCC Rcd 4115 (1988).[1] In its counterproposal, Dubois alleged that the substitution was necessary to enable it to increase WBDC's power to 6kW, and to move the transmitter site closer to its city of license, thereby providing enhanced service to Huntingburg. River Valley, a nonparticipant in this proceeding at this stage, filed its application for construction permit on September 20, 1989, over one year after Dubois filed its counterproposal.

3. The *R&O* in this proceeding was released March 20, 1990. In the *R&O*, we treated Dubois's counterproposal as comments, granting its request by allotting Channel 234A at Philpot, after determining through a staff engineering analysis that the allotment could be made in accordance with the minimum distance separation requirements.

4. *Petition for Reconsideration.* In its petition for reconsideration, River Valley alleges that the Division erred in the *R&O* because the allotment of Channel 234A at Philpot short-spaces River Valley's application for a construction permit to relocate the transmitter site of its Station WRBT(FM), Mt. Carmel, Illinois. River Valley alleges that pursuant to Section 307(b) of the Communications Act of 1934, as amended, the Division should have allotted Channel 264A at Philpot as originally proposed to avoid a conflict between the Philpot allotment and River Valley's application to change transmitter site. River Valley also asserts that Dubois's counterproposal was technically defective. It argues that the Philpot counterproposal violated Sections 73.207(a) and 73.208(a) of the Commission's Rules because Channel 234A is short-spaced to the reference coordinates for Channel 234C at Cookeville, Tennessee. River Valley adds that Dubois's counterproposal for Channel 253A at Hawesville did not include an engineering study showing compliance with the Commission's technical rules.

5. *Discussion.* A pending application for construction permit such as River Valley's is generally considered a site preference unless the applicant makes a showing to the contrary. In weighing the benefits of protecting the application site versus the provision of new service, the new allotment is generally preferred. *See Andalusia, Alabama*, 49 FR 32201 (1984). River Valley has made no showing as to why we should consider its site as anything more than a mere preference.

6. We recognize that we could have accommodated River Valley's application in this proceeding by allotting Channel 264A at Philpot. However, had we done so, there would have remained pending Dubois's counterproposal in Docket 88-315 seeking, *inter alia*, the substitution of Channel 265B1 for Channel 265A at Hardinsburg and the allotment of Channel 234A in lieu of Channel 264A at Philpot. *See* n.1 *supra*. Under *Andalusia*, the provision of an upgraded service outweighs the benefit of protecting a mere site preference. Given the possibility that the Dubois counterproposal could prevail in Docket 88-315, thereby

[1] On June 8, 1988, after the counterproposal deadline in this docket had passed, Dubois filed a supplement to its counterproposal requesting an upgrade for Station WBDC from Channel 265A to Channel 265B1. This upgrade required the substitutions of Channel 234A for Channel 264A at Philpot, Channel 287A for Channel 265A at Scottsburg, Indiana, Channel 266C1 for Channel 266C at Russellville, Kentucky, and Channel 253A for Channel 289A at Hawesville. This supplement was not considered. *See R&O* at n.2.

On August 26, 1988, Dubois timely filed a counterproposal in Docket 88-315 requesting the same channel substitution contained in its supplement, excluding the channel change at Hawesville. It noted that the Hawesville change was not necessary for its upgrade to Channel 265B1, and was "inadvertently included" in its counterproposal in Docket 88-126. River Valley filed opposing comments.

We are resolving Docket 88-315 in a *Second Report and Order* issued simultaneously with this action. *See Second Report and Order (Hawesville, et al., Kentucky)*, 7 FCC Rcd _____ (adopted April 15, 1992).

requiring the substitution of Channel 234A in lieu of Channel 264A at Philpot, we allotted Channel 234A in this proceeding after we conducted a channel analysis and determined that the channel substitution could be made at Philpot without prejudice to any other rule making or any other pending matter requiring protection. By making the substitution in this proceeding, we served the public interest by providing a degree of certainty to prospective Philpot applicants of the channel for which they were applying from the time the allotment was made. Had we not made the substitution in this proceeding, a grant of Dubois's counterproposal in Docket 88-315 would necessitate amendment of the Philpot applications and a potential delay in the provision of new service to the community.[2]

7. River Valley's argument that Dubois's counterproposal was defective and thus was erroneously granted is premised on the incorrect assumption that we granted Dubois's counterproposal. However, the *R&O* did not grant Dubois's *counterproposal;* rather, it treated Dubois's requests as *comments* seeking the allotment of an alternate channel to Philpot.[3] While a counterproposal must be technically correct when filed, *see Broken Arrow and Bixby, Oklahoma, et al.*, 3 FCC Rcd 6507 (1988), a channel substitution may be implemented by the Commission on its own motion in order to resolve conflicts between proceedings. *See, e.g., Pinewood, South Carolina*, 5 FCC Rcd 7609 (1990). All parties to applications or petitions for rule making before the Commission are on notice that a channel substitution may occur. While our general policy is that all allotment proposals must clear reference coordinates for vacant allotments, we have accepted proposals that clear sites specified in construction permits. *See, e.g., Whiting, et al., Wisconsin*, 6 FCC Rcd 2624 (1991). The allotment of Channel 234A at Philpot, while short-spaced to the reference coordinates of Channel 234C at Cookeville, cleared Station WGSQ's construction permit site. That construction permit (File No. BPH-880428NM) was granted on July 22, 1988, well before we determined whether we should allot the alternate channel to Philpot. Second, while River Valley argues that the Hawesville aspect of Dubois's counterproposal did not include an engineering study, this proceeding did not address the Hawesville allotment. Therefore, any errors that may have been present with regard to the Hawesville proposal would not be fatal to the Philpot aspect of the proposal.

8. Finally, we note that the application (File No. BPH-890920IC) for construction permit for which River Valley was seeking protection in this proceeding was dismissed on May 3, 1990 for failure to respond to a staff written demand to submit required FAA authorization. On March 24, 1992, the Audio Services Division denied by letter River Valley's petition for reconsideration of that dismissal. *See* Letter from Chief, Audio Services Division, March 24, 1992. Accordingly, River Valley's interest in this proceeding is now moot.

9. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by River Valley Radio, Inc., IS DENIED.

10. IT IS FURTHERED ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Victoria M. McCauley, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[2] We note that two applications (File Nos. BPH-900705MJ, BPH-900703MB) are pending for Channel 234A at Philpot.

[3] A counterproposal is a proposal for an alternative and mutually exclusive allotment or set of allotments in the context of the proceeding in which the proposal is made. *See Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments*, 5 FCC Rcd 931, n.4 (1990). Dubois's request, although offering an alternative allotment, was not mutually exclusive with the proposed channel. Therefore, we did not treat Dubois's request as a counterproposal.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-94

In the Matter of

Amendment of Section 73.202(b), RM-7955
Table of Allotments,
FM Broadcast Stations.
(Springfield, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 15, 1992; Released: May 1, 1992

Comment Date: June 22, 1992
Reply Comment Date: July 7, 1992

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by James Ingstad Broadcasting, Inc. ("petitioner"), requesting the substitution of Channel 234C2 for Channel 234A at Springfield, Minnesota.[1] Petitioner also requests modification of its construction permit (BPH-881221MD) for Station KLPR(FM) to specify operation on Channel 234C2. Petitioner submitted information in support of the proposal and expressed its intention to apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration. Channel 234C2 can be allotted to Springfield, Minneosta, consistent with the Commission's spacing requirements, at petitioner's specified site.[2] We shall also propose to modify the construction permit for Station KLPR(FM), Channel 234A, to specify operation on Channel 234C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. We believe the public interest would be served by proposing the allotment of Channel 234C2 to Springfield, Minnesota, since it could provide the community with its first wide coverage area FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Springfield, Minnesota	234A	234C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 22, 1992,** and reply comments on or before **July 7, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Clifford M. Harrington
Matthew P. Zinn
Fisher, Wayland, Cooper and Leader
1255 23rd Street, N.W., Suite 800
Washington, D.C. 20037-1125

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] Although Station KLPR(FM) currently holds a construction permit for Channel 289A, the Commission has substituted Channel 234A for Channel 289A at Springfield. *See Report and Order* (MM Docket 90-532), 7 FCC Rcd 1668 (1992).

[2] The coordinates for Channel 234C2 at Springfield are 44-22-45 and 95-19-00.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 3990
Tariff F.C.C. Nos. 2, 9, and 11

ORDER

Adopted: April 23, 1992; Released: April 23, 1992

By the Chief, Common Carrier Bureau:

1. On April 10, 1992, AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective April 24, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces a promotion as an incentive for customers to order AT&T's 800 Guaranteed Nodal Validator Optional Feature.

2. On April 17, 1992, MCI Telecommunications Corporation (MCI) filed a petition to reject or, in the alternative, to suspend and investigate Transmittal No. 3990.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 3990 and MCI's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Tariff F.C.C. Nos. 2, 9, and 11, Transmittal No. 3990, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.* Memorandum Opinion and Order, FCC 92-181, released Apr. 17, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-420

In the Matter of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC. — File No. BPET-811118KF

Permittee of Noncommercial Educational Television Station KEEF-TV, Los Angeles, CA

Order to Show Cause Why the Permit of KEEF-TV should not be revoked and Notice of Apparent Liability for a Forfeiture

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC. — File No. BLET-870225KE

Permittee of KEEF-TV, Los Angeles, CA

For License to Cover Construction Permit

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC. — File No. BMPCT-870610KU

Permittee of KEEF-TV, Los Angeles, CA

For Consent to Modify Construction Permit

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC. — File No. BLET-870610KT

Permittee of KEEF-TV Los Angeles, CA

For License to Cover Construction Permit

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC.

Permittee of KEEF-TV Los Angeles, CA

For Special Temporary Authority

ORDER

Adopted: April 23, 1992; Released: May 1, 1992

By the Commission:

1. On April 15, 1983, Black Television Workshop of Los Angeles, Inc. (BTW) obtained a permit to construct a noncommercial UHF television station on reserved Channel 68 to serve the Los Angeles area with the call letters KEEF-TV. After successively requesting and receiving four extensions of time to complete construction, which was originally required to be completed in 1984, BTW finally obtained program test authority in 1987 and commenced operation. As it was broadcasting from a different tower, with a different antenna height, a different type of transmitter, and a different level of power than its permit authorized, however, the Mass Media Bureau ordered KEEF-TV off the air, and it has remained dark ever since.

2. BTW subsequently applied for modification of the permit. However, in response to a series of pleadings prompted by an informal objection to the application by one of BTW's original directors, the Commission instituted this proceeding to determine whether the permit should be revoked. *Order to Show Cause, Hearing Designation Order, and Notice of Apparent Liability*, 3 FCC Rcd 5443 (1988) ("*HDO*"). The *HDO* specified issues as to whether, *inter alia*, control of the permittee had been transferred without approval, in violation of 47 U.S.C. §310(d), and whether any of BTW's principals or associated persons had attempted to deceive the Commission by misrepresentation or concealment of facts relevant to the Section 310(d) issue.

3. The hearing has yet to be conducted. On March 22, 1989, five days before the scheduled date of the first hearing session, BTW asked the Review Board to stay the proceeding because it had agreed to assign the permit to a minority-owned firm and was simultaneously filing an assignment application and an associated petition for special relief invoking the minority distress-sale policy. The Board granted a two-week stay on the strength of a letter of intent promising that a "definitive" assignment contract would be executed by March 24. 4 FCC Rcd 2663, 2664 ¶ 7. Also on March 22, 1989, a BTW principal filed a motion to disqualify the presiding ALJ. The ALJ dismissed the petition, and BTW filed an exception to the ruling, thereby compelling the ALJ to certify the issue to the Commission pursuant to 47 C.F.R. §1.245(b)(4) and stay the proceeding pending disposition of the interlocutory appeal.

4. The Mass Media Bureau dismissed the assignment application and denied the distress-sale petition because, *inter alia*, the Court of Appeals had recently held, in *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902 (D.C. Cir. 1989), reversed *sub nom Astroline Communications Co. Limited Partnership v. Shurberg Broadcasting of Hartford, Inc.*, 110 S.Ct. 2997 (1990), that the distress sale policy was unconstitutional. After the Supreme Court's reversal of *Shurberg*, we directed the Bureau to give further consideration to the assignment application. 6 FCC Rcd 381 (1991). Noting, however, that the proposed sale price was not limited to expenses, whereas 47 C.F.R. § 73.3597(c)(2) prohibited the sale of an "unbuilt" station, such as KEEF-TV, for more than the seller's reasonable out-of-pocket expense, we ruled that the application would be dismissed unless the signatories cured the defect by amending the price. 6 FCC Rcd 381 (1991), recon. denied, 6 FCC Rcd 4431 (1991), appeal pending *sub nom. Black Television Workshop of Los Angeles, Inc. v. FCC*, D.C. Cir. No. 91-1402. No such amendment was submitted, and the Mass Media Bureau dismissed the assignment application at the assignee's request on March 5, 1992.

5. In a Memorandum Opinion and Order released on November 8, 1991, we denied BTW's appeal from the dismissal of the motion to disqualify, which we found to be utterly devoid of merit, thereby removing the automatic stay that had been imposed by virtue of §1.245(b)(4). 6 FCC Rcd 6525.

6. In light of these circumstances, the public interest demands that this proceeding be conducted henceforth with dispatch. Four years of procedural wrangling, while a television assignment made nearly a decade ago remains unused, are enough. We therefore direct that the presiding judge expedite these proceedings to the greatest extent possible consistent with due process. Moreover, as we did in *WWOR-TV, Inc.*, 6 FCC Rcd 1524, 1525 ¶ 14 (1991), we will rule directly on any exceptions to the initial decision.

7. ACCORDINGLY, IT IS ORDERED that the presiding ALJ SHALL EXPEDITE this proceeding and the issuance of an initial decision and that any exceptions to the initial decision in this proceeding SHALL BE SUBMITTED TO THE COMMISSION rather than to the Review Board.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-62

In the Matter of

Amendment of Part 90.69 of the Commission's Rules and Regulations Concerning Eligibility in the Motion Picture Radio Service — RM-7406

REPORT AND ORDER

Adopted: April 21, 1992; Released: May 1, 1992

By the Commission:

I. INTRODUCTION

1. By a *Notice of Proposed Rule Making* in PR Docket No. 91-62, 6 FCC Rcd 1966 (1991) (*"Notice"*), we proposed to expand the eligibility provisions of the Motion Picture Radio Service ("MPRS"), which are set forth in Section 90.69(a) of the Commission's Rules. The Motion Picture Radio Service authorizes persons engaged in the production of motion pictures to use radio frequencies for production coordination during the on-location filming of motion pictures produced for distribution to movie theaters. As explained more fully below, we will adopt the proposal substantially as set forth in the *Notice*.

II. BACKGROUND

2. The use of radio frequencies to assist motion picture production was first authorized by the Radio Act of 1927. In 1937, the Commission clarified the rationale behind establishing the Motion Picture Radio Service. The MPRS was established, the Commission stated, "for use in the motion-picture industry in connection with the production of major motion-pictures.... [The MPRS] may be authorized for operation when pictures are to be taken at sea, in the desert, or under circumstances where the operation of large groups of personnel must be coordinated or aircraft directed." *Third Annual Report of the Federal Communications Commission to the Congress of the United States for the Fiscal Year 1937*, at 72-73. The eligibility for this service has not been expanded since it was created more than 60 years ago. At the time the Motion Picture Radio Service was conceived, motion pictures intended for theatrical distribution were the only types of films produced. Now, however, there are diverse types of mass media programming, of which motion pictures intended for theatrical screening are only a part.

3. This rule making was initiated by a petition filed by the Alliance of Motion Picture and Television Producers ("AMPTP"), requesting that the Commission expand eligibility for the MPRS to include this multitude of new, independent programming sources and the distribution of these productions through a variety of media outlets. Specifically, AMPTP requested that the eligibility provisions of Section 90.69(a) be expanded to include radio communications by individuals involved in the on-location videotaping or filming of major events, such as sporting events and political conventions, primarily intended for transmission to the public. The Special Industrial Radio Service Association, Inc. ("SIRSA") filed informal comments proposing that eligibility also be extended to producers of educational and business training films not intended for screening at theaters or on television and to entities providing supporting services to MPRS eligibles.[1]

4. In the *Notice*, we proposed to amend Section 90.69(a) to extend eligibility to:

> (1) Persons primarily engaged in the production, video taping or filming of motion pictures or television programs, including but not limited to, movies, programs, news programs, sporting events, educational programming, or commercial training films, regardless of whether the films are produced primarily for final exhibition at theatrical outlets or on television, or for distribution through other mass communications or non-mass communications outlets; [and]
>
> (2) Persons providing services in support of eligibles in the Motion Picture Radio Service.

6 FCC Rcd at 1968. We also noted that the prohibitions contained in Section 90.415 against the use of MPRS spectrum for transmission to the public would be retained.[2]

5. AMPTP, Capital Cities/ABC, Inc. ("Capital Cities"), the National Basketball Association and the National Hockey League ("NBA/NHL"), Sports Legends, Inc., Berl Rotfeld Productions, Inc. and ProServ Television ("Sports Producers") filed comments supporting the expanded eligibility proposal. AMPTP and SIRSA filed reply comments. No comments were received that opposed expanding MPRS eligibility.

6. In its comments, AMPTP asserts that the eligibility language set forth in the *Notice* is ambiguous and, consequently, could exclude entities intended to be covered and include entities outside the scope of the MPRS. In particular, AMPTP believes that, unless they are specifically mentioned in the rule, producers of videotaped "documentaries, special programs, sporting events, music videos, educational programs, and commercials" could be excluded from eligibility.[3] It also argues that providing explicit eligibility in the rule for producers of videotapes

[1] SIRSA further proposed that, as in the current rules, entities who use radio frequencies for on-location communication not in connection with filming, at events such as parades and political rallies, would continue to be excluded from eligibility.

[2] 6 FCC Rcd at 1968 n.11.

[3] AMPTP comments at 4-5.

intended for "non-mass communications" distribution could unintentionally extend eligibility to those who intend to make home videotapes for personal television playback.[4] Finally, AMPTP suggests that eligibility be limited to entities providing actual "technical" production support services to eligible entities.[5]

7. Capital Cities supports extending MPRS eligibility to producers of cable and television programming as well as to "itinerant" program producers, *e.g.*, independent producers of programs filmed on-location.[6] These program producers currently share with local television broadcasters auxiliary broadcast spectrum used both for on-location voice communications and location-to-studio program relay, Capital Cities contends. Thus, it maintains that allowing television, cable and itinerant program producers to use MPRS spectrum would enable them to coordinate on-location audio production without jeopardizing higher-priority broadcast program relay transmissions.[7]

8. In contrast, the Sports Producers and NBA/NHL believe that television licensees should be excluded from MPRS eligibility since they can use Part 74 spectrum for on-location voice communications.[8] The Sports Producers and NBA/NHL suggest that we should extend eligibility to entities engaged in videotaping or filming "live" productions so that producers of live sporting events, who now use Business Radio Service frequencies, are specifically included.[9] In addition, to reduce interference potential, Capital Cities proposes adopting a 40-watt power limitation, which it believes is sufficient power for communicating at on-location sites.[10] Finally, Capital Cities, AMPTP and SIRSA agree with the *Notice* that extending MPRS eligibility to television production entities engaged in on-location videotaping should not affect the prohibition against use of MPRS spectrum for transmission to the "public as set forth in Section 90.415.[11]

9. AMPTP and SIRSA's reply comments generally oppose Capital Cities, the Sports Producers and NBA/NHL. AMPTP asserts that the purpose of the MPRS is to provide communications support for "itinerant" on-location production, as opposed to a local television broadcast station's on-location production.[12] In this regard, AMPTP and SIRSA contend that since Part 74 of the Rules already reserves for television stations spectrum for the transmission of on-location voice communications, MPRS eligibility should only be extended to entities not otherwise eligible for transmission to the public.[13] Similarly, SIRSA adds that only entities engaged in videotaping "live" programs and which are not otherwise eligible for Part 74 spectrum should be permitted to use MPRS spectrum so that impermissible transmission to the public through private radio frequencies is avoided.[14] AMPTP and SIRSA emphasize that because the MPRS is already shared with the Special Industrial Radio Service and the Relay Press Radio Service, including producers who can use broadcast frequencies would further congest MRPS spectrum.[15]

10. Finally, SIRSA opposes the recommendation that a power restriction of 40 watts be imposed on MPRS licensees, noting that some Special Industrial Radio Service or Relay Press Radio Service co-sharers have licensed operations on MPRS channels with transmitter output powers as high as 300 watts.[16] It adds, however, that if the Commission were to adopt the 40-watt limitation, existing licensees' operations should be "grandfathered" at higher powers to prevent disruption of service.[17]

III. DISCUSSION

11. At the outset, we are renaming the Motion Picture Radio Service the "Video Production Radio Service" ("VPRS") to reflect the broader eligibility criteria we are adopting herein.[18] As stated in the *Notice*, we believe that eligibility for the Motion Picture Radio Service should be expanded to include technologies and services developed after the service was created more than 60 years ago. We also agree with some of the commenters that the proposal set out in the *Notice* can be refined to ensure that eligibility is extended in a manner consistent with the primary purpose of the Video Production Radio Service: the radio coordination of on-location film production for the protection of life and property. While the primary purpose of the VPRS is to enable the use of radio for the protection of life and property, we will permit eligibles to utilize the VPRS in the provision of all types of supporting services, both "technical" and otherwise. Accordingly, we believe that VPRS eligibility should be expanded for the purpose of coordinating radio communications during the on-location filming of motion pictures *and* videotaped mass media programming. Eligibility will also be extended to entities engaged in the production of educational and training films not intended for distribution to movie theaters or on television since, as stated in the *Notice*, their inclusion satisfies a legitimate public interest need.[19]

12. In adopting expanded eligibility criteria, we will not draw distinctions between "itinerant" and other kinds of mass media production entities. While AMPTP recommends that only "itinerant" videotape program producers be included in the expanded eligibility criteria, we note that by its very nature, the majority of on-location videotaping and filming is "itinerant." On-location videotaping and filming is generally an episodic or short-term, rather than a fixed or continuous, activity. In addition, on-location communications during videotaping and filming generally is geographically localized. We thus see no need to differentiate between "itinerant" and other

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[4] *Id.* at 5-6.
[5] *Id.* at 8.
[6] Capital Cities comments at 2-3.
[7] *Id.*
[8] Sports Producers at 3 n.3; NBA/NHL at 2 n.3.
[9] Sports Producers at 2-3; NBA/NHL at 2-3.
[10] Capital Cities at 3.
[11] Capital Cities at 3, AMPTP reply at 6, SIRSA reply at 9.
[12] AMPTP reply at 6-7.
[13] AMPTP reply at 5-8, SIRSA reply at 7-9.
[14] SIRSA reply at 11-12.
[15] AMPTP reply at 5-6, SIRSA reply at 8-9.
[16] SIRSA at 9-10.
[17] *Id.* at 10.
[18] SIRSA suggested renaming the MPRS the "Motion Picture and Television Radio Service," while NBA/NHL and the Sports Producers suggested the "Television and Motion Picture Radio Service." SIRSA reply at 10-11, NBA/NHL at 3 n.5, Sports Producers at 3 n.5. We believe "Video Production" captures the essence of the intended expansion.
[19] 6 FCC Rcd at 1966.

kinds of on-location production entities since all are engaged in the on-location film and videotape production activities that form the basis of eligibility in this radio service.

13. We appreciate the concerns that AMPTP raises regarding congestion that could result from unrestricted access to the VPRS by those television or cable entities that are eligible for licenses under Part 74 or Part 78 of the rules. As a result of this proceeding, the VPRS, which currently shares channels among the Special Industrial Radio and Relay Press Radio Services, will encompass an even broader range of eligibles. Despite the potential congestion, we are unable to justify barring television and cable production entities -- as a class -- from eligibility, as AMPTP requests.[20] We do believe, however, that it is appropriate to limit the *use* of the VPRS to minimize congestion. AMPTP identifies potential use by local television stations for on-location productions as a primary source of congestion and regards such uses as outside the scope of permissible communications for the VPRS. We agree. For these reasons, we will not permit television or cable entities that are eligible to be licensed under Part 74 or Part 78 of the rules to use the VPRS (1) to transmit programming,[21] (2) to coordinate the live transmission of an event, or (3) to coordinate the taping of an event, where the taped material is to be transmitted to the public within 48 hours.[22]

14. We agree with commenters that some modification of the eligibility proposal set out in the *Notice* is needed to identify clearly all eligible entities, consistent with the essential purpose of the service. The *Notice* proposed eligibility for "[p]ersons primarily engaged in the production, video taping or filming of motion pictures or television programs, including but not limited to, movies, programs, news programs, sporting events, educational programming, or commercial training films...."Substituting "such as" for "including but not limited to" will clarify that the named entities are merely illustrative of the broad range of eligibles and are not intended to restrict use of the VPRS solely to those entities enumerated. Producers of "documentaries, special programs, sporting events, music videos, educational programs, and commercials," therefore, would be eligible to use the VPRS for on-location videotape and film production, as would producers of news programs and live special events. In view of the above, we decline to enumerate the additional entities in the amended rule suggested by AMPTP.

15. We further decline to specify that entities engaged in "live" sporting events are covered in the rule because, under the expanded eligibility criteria set out above, entities engaged in on-the-site videotaping or filming of live special events are already eligible to use VPRS spectrum for on-site production coordination. As with the Motion Picture Radio Service, we are not permitting television or cable producers to utilize channels in the VPRS to coordinate on-site production not in connection with filmmaking. Entities that use radio to *coordinate* events, such as political rallies and parades, are *not* eligible to use the VPRS.[23] If, on the other hand, the rallies or parades are to be filmed or videotaped for a documentary or news program, the producers will be eligible for VPRS spectrum. We will also delete the phrase "non-mass [media] communications" from the amended rule. That phrase was intended to cover eligibles producing educational or training films not intended for distribution to movie theaters, television, or other mass communications outlets. We agree with AMPTP that this phrase could create ambiguity.

16. Additionally, since educational programs and training films are closely related to the other types of productions identified as acceptable for eligibility in this service, producers of these films will be eligible to use the VPRS for film production. We further believe that it is not necessary to specifically distinguish between "technical" and other kinds of supporting production services. Our only criteria for the use of the VPRS is that the service be used to contribute to or enhance the efficiency of on-location film production.

17. Finally, it is unnecessary to adopt a 40-watt power limitation in order to reduce potential interference. All spectrum assigned to the VPRS is shared. In many areas, therefore, it is heavily congested. Our method of resolving interference complaints on shared frequencies is set forth in Section 90.173 of the Rules. That section requires private radio licensees to work out interference problems among themselves through the frequency coordination process.[24] Because Video Production Radio Service frequencies are shared with the Special Industrial Radio Service and the Relay Press Radio Service, both of which have licensees that operate at transmitter output power levels that could exceed 40-watts, we reject any arbitrary power limit that would accommodate the needs of some VPRS eligibles and unilaterally exclude other groups. Although the expanded eligibility criteria will increase the use of the VPRS and may make the sharing environment more complex, authorizing additional users should not have a preclusive effect on any co-channel users.

IV. CONCLUSION

18. In this *Report and Order*, we expand the eligibility criteria for the Motion Picture Radio Service and rename that service the Video Production Radio Service to reflect the broader eligibility. Eligibility now includes diverse entities engaged in on-location film production, such as the

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[20] We believe it is inappropriate to exclude from VPRS eligibility all entities that are eligible to be licensed under Part 74 of the rules, as AMPTP suggests, since we would be excluding many *existing* MPRS eligibles, such as Fox Broadcasting Company and Disney Productions, that are also Part 74 and Part 78 licensees. *See* AMPTP reply at 5-8. Such a result would be contrary to the intention of this rule making.

[21] *See* Section 90.415 of the Rules.

[22] The 48-hour limitation is intended to exclude from VPRS eligibility entities involved in the production of videotaped news or sporting events. These entities are *now* eligible to use channels in Parts 74 or 78 of the Rules for such purposes.

[23] *Cf.* Capital Cities comments at 2, requesting eligibility for television and cable producers' on-the-scene communications generally.

[24] Section 90.173(b) states, in relevant part, that "[a]ll applicants and licensees shall cooperate in the selection and use of frequencies in order to reduce interference and make the most effective use of the authorized facilities. Licensees of stations suffering or causing harmful interference are expected to cooperate and resolve this problem by mutually satisfactory arrangements."

videotaping or filming of television programs or motion pictures produced for final distribution to motion picture theaters, television or other mass communications outlets. Eligibility is also extended to those entities producing educational or training films not produced for movie theaters, television or other distribution outlets. Eligibility is further extended to those entities providing supporting services to VPRS eligibles. By this action, we amend our rules to accommodate additional technologies and services developed since the MPRS was created more than 60 years ago.

V. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 C.F.R. §§ 4(i) and 303(r), Part 90.69(a) of the Commission's Rules is AMENDED effective [30 days after publication in the *Federal Register*], as set forth in Appendix B below.

20. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

21. For further information contact Tatsu Kondo, Private Radio Bureau, at (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A: PROCEDURAL MATTERS

(1) FINAL REGULATORY FLEXIBILITY ANALYSIS

Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows.

I. Need and purpose of this action:

This *Report and Order* amends the eligibility criteria governing the Motion Picture Radio Service, which has been renamed the Video Production Radio Service, to encompass additional technologies developed since the service was created. In addition to motion picture production, eligibility is extended to on-location videotape production of mass media programming, regardless of the ultimate distribution mode. Many small video and film production entities could be positively affected by this action because additional radio communications options will be made available to them. This action furthers the Commission's goals of promoting efficiency and innovation in the allocation, licensing and use of the electromagnetic spectrum.

II. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

III. Significant alternatives considered:

The *Notice of Proposed Rule Making* asked whether amendment of the rules governing eligibility for the Motion Picture Radio Service was desirable to accommodate technologies, such as television broadcasting, developed after the MPRS was created in 1927. After considering the comments, we adopted some of the commenters' suggestions to modify the proposal set out in the *Notice*.

(2) PAPERWORK REDUCTION ACT STATEMENT

The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure or record retention requirements and will not increase burden hours imposed on the public.

APPENDIX B

Part 90 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 331, 48 Stat., as amended, 1066, 1082; U.S.C. §§ 154, 303, and 332, unless otherwise noted.

2. Section 90.69 is amended by revising paragraph (a) to read as follows:

§ 90.69 Video Production Radio Service

(a) Eligibility. The following are eligible to hold authorizations in the Video Production Radio Service to operate radio stations for transmission of communications essential to such activities of the licensee.

(1) Persons primarily engaged in the production, videotaping or filming of motion pictures or television programs, such as movies, programs, news programs, special events, educational programs or training films, regardless of whether the productions are prepared primarily for final exhibition at theatrical outlets or on television or for distribution through other mass communications outlets. Television or cable entities that are eligible to be licensed under Part 74 or 78 of the Rules are not eligible to use the Video Production Radio Service:

(i) To transmit programming (*see* § 90.415);

(ii) To coordinate the live transmission of an event, or

(iii) To coordinate the taping of an event, where the taped material is to be transmitted to the public within 48 hours.

(2) Persons providing services in support of eligibles in the Video Production Radio Service.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-10

In the Matter of
Provision of Access for
800 Service

ORDER

Adopted: April 9, 1992; Released: April 10, 1992

Reply Comment Date: May 1, 1992

By the Chief, Common Carrier Bureau:

1. On April 3, 1992, the Bell Operating Companies (BOCs) and GTE Service Corporation and its Affiliated Domestic Telephone Operating Companies (GTE) filed a joint motion seeking a seventeen day extension until May 1, 1992, of the deadline for filing reply comments on their Implementation Plan for 800 database access service.[1] The GTE/BOCs state that this extension is necessary for several reasons.

2. First, they state that hundreds of pages of comments were filed on their plan and that these comments deal with virtually every aspect of the plan. Second, they state that some of the comments raise new issues not previously raised with the GTE/BOCs or in the Carrier Liaison Committee 800 forum. The GTE/BOCs contend that more time is needed to analyze these points and to try to develop common responses for the eight companies. Third, the GTE/BOCs state that several commentors request that they agree to substantial additional work efforts. The GTE/BOCs assert that they need time to review these requests to determine, which, if any, can be reasonably undertaken without jeopardizing the March 1993 implementation date. Finally, they claim that the Commission would be best served if they could file a single, joint response to the comments, rather than eight separate responses. Without more time, they argue, it would be difficult if not impossible for a coordinated response to be prepared.

3. It is the policy of this Commission that extensions of time shall not be routinely granted.[2] However, in this case, we believe that an extension is appropriate. In granting this extension, it is our expectation that the additional time requested will enable all parties to narrow their differences, and to move towards a consensus on the issues that have been identified in the Implementation Plan and comments thereon. In addition, this extension should enable parties to sharpen their focus on any area on which consensus cannot be achieved. We emphasize that the goal of number portability is a crucial priority of this Commission and that this extension of time should not be construed to indicate that we are not committed to our March 1993 schedule for implementing number portability. On the contrary, we remain firmly committed to that schedule.

4. Accordingly, IT IS ORDERED, pursuant to sections 4(j) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(j) and 155(c), and authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. Sections 0.91 and 0.291, that the request of the GTE BOCs for an extension of time is GRANTED. The deadline for filing reply comments is extended to May 1, 1992.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[1] This plan is required by the Commission's *Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking* adopted August 1, 1991 in CC Docket No. 86-10, 6 FCC 5421 (*Reconsideration Order*).

[2] *See* 47 C.F.R. Section 1.46(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-101

In the Matter of

Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards, "Employers Accounting for Postretirement Benefits Other Than Pensions"

Bell Atlantic Tariff F.C.C. No. 1	Transmittal No. 497
US West Communications, Inc. Tariff F.C.C. Nos. 1 and 4	Transmittal No. 246
Pacific Bell Tariff F.C.C. No. 128	Transmittal No. 1579

ORDER OF INVESTIGATION AND SUSPENSION

Adopted: April 29, 1992; Released: April 30, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Bell Atlantic Telephone Companies (Bell Atlantic), US West Communications, Inc. (US West), and Pacific Bell (Pac Bell) have filed the above-captioned tariffs to increase their price cap index levels as a result of their implementation of the Statement of Financial Accounting Standards - 106 (SFAS-106), "Employers Accounting for Postretirement Benefits Other Than Pensions" (OPEB).[1] These local exchange carriers (LECs) assert that the change in accounting necessary for implementation of SFAS-106 should be recognized as an exogenous cost change under the Commission's price cap rules.[2] In this Order the Bureau suspends for five months the tariffs filed by Bell Atlantic and US West[3] and designates for investigation issues arising from the Bell Atlantic, US West, and Pac Bell claims that exogenous treatment is appropriate in these circumstances.

II. BACKGROUND

2. In December 1990, the Financial Accounting Standards Board (FASB) adopted SFAS-106, which changes the way businesses following Generally Accepted Accounting Principles (GAAP) must account for benefits other than pensions that are provided to retired employees. These are typically medical benefits. Traditionally, these benefits have been accounted for on a "pay-as-you-go" basis, recognizing the amounts actually paid to retired employees each year. SFAS-106, however, requires accounting recognition of these benefits as they are earned by employees during their working years. Under SFAS-106, the new accounting is required for fiscal years beginning after December 15, 1992, and earlier implementation is encouraged. Furthermore, companies not only have to change to accrual accounting on a going-forward basis, they also must correct their accounting practices to recognize all future benefits of existing retirees and employees.

3. Since 1985, the Commission has implemented a policy of following GAAP, including new FASB standards, unless adoption of the principle or practice conflicts with the Commission's regulatory objectives. This policy is incorporated into Section 32.16 of the Commission's Uniform System of Accounts (USOA), 47 C.F.R. § 32.16. Pursuant to Section 32.16, the Bureau issued an Order authorizing all subject carriers to adopt SFAS-106, on or before January 1, 1993, as a mandatory practice for purposes of the USOA.[4]

4. In the transmittals now pending before us, Bell Atlantic, US West, and Pac Bell argue that the incremental costs of implementing SFAS-106 should be reflected as exogenous cost changes, increasing their price cap indexes. These LECs contend that these costs are not reflected in the price cap formula. In support of their arguments, these LECs have submitted studies that they believe evidence

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[1] *See* Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 497 (Filed Feb. 28, 1992); US West Communications, Inc. Tariff F.C.C. Nos. 1 and 4, Transmittal No. 246 (Filed Apr. 3, 1992); Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1579 (Filed Apr. 16, 1992).

[2] *See* Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice, 4 FCC Rcd 3379 (*AT&T Price Cap Order*), *modified on recon.*, 6 FCC Rcd 665 (1991) (*AT&T Price Cap Reconsideration Order*), *appeal docketed, AT&T v. FCC*, No. 91-1178 (D.C. Cir. Apr. 15, 1991); Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.* 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Orde r*), *recon. dismissed*, FCC 91-344, released December 20, 1991, *further modified on recon.*, 6 FCC Rcd 4524 (1991) (*ONA Part 69 Order*), *petitions for recon. of ONA Part 69 Order pending, appeal docketed, District of Columbia PSC v. FCC*, No. 91-1279 (D.C. Cir. June 14, 1991); Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd 5880 (1991) (*Interexchange Order*) (further streamlining and removing from price cap regulation most of AT&T's business services), *on recon.*, FCC 92-181 (released Apr. 17, 1992).

[3] Since we anticipate that the issues raised herein for investigation will be resolved prior to the January 1, 1993, effective date of the Pac Bell tariff, we do not suspend the Pac Bell tariff in this Order.

[4] Southwestern Bell, GTE Corporation, Notification of Intent

differences between the impact of SFAS-106 upon the price cap LECs as a whole and the American economy as a whole.[5]

5. In its price cap decisions, the Commission created an incentive-based system of regulation that rewards carriers who exceed a benchmark measure of cost changes. The benchmark is composed of cost indicators outside of any carrier's control. For example, an inflation measure (Gross National Product Price Index, or GNP-PI) reflects economy-wide cost changes, while a productivity offset to the inflation measure reflects the historical productivity of the telephone industry, which has exceeded the productivity of the economy as a whole. Finally, the Commission identified certain cost changes triggered by administrative, legislative, or judicial action beyond the control of the carriers.[6] The Commission determined that these "exogenous costs" should result in an adjustment to the cap in order to ensure that the price cap formula does not lead to unreasonably high or unreasonably low rates.[7]

6. Changes in GAAP are not given routine exogenous cost treatment.[8] The Commission determined that cost changes resulting from GAAP changes may already be reflected in the inflation measure, which is intended to capture economy-wide cost changes. The Commission therefore stated that carriers claiming that GAAP changes are exogenous would bear the burden of demonstrating that no double-counting would result from exogenous treatment, even if the carriers demonstrate that the costs are beyond their control.[9]

III. REASONS FOR SUSPENSION AND INVESTIGATION

7. The instant LECs' claim for exogenous treatment of costs attributable to SFAS-106 accounting changes is based on complicated econometric analysis and reasoning. Evaluation of this analysis and other issues raised in the transmittals is likely to require equally complicated review and opportunity for full participation by other interested parties. In addition, the threshold issue presented by these transmittals -- whether costs of SFAS-106 should be treated as exogenous costs -- is common to all price cap carriers. Because of the complex issues raised by the arguments and studies on which these rate increases are based, the importance of these issues as they relate to the operation of the Commission's price cap plan, and the monetary importance of the Bell Atlantic, US West, and Pac Bell filings,[10] we conclude that an investigation of the proposed adjustment to price cap rate indexes is warranted.

8. We further conclude that the changes submitted by Bell Atlantic and US West are of sufficient magnitude and their justification is sufficiently questionable that the changes in rates and indexes should be suspended while this investigation proceeds.[11] Accordingly, in this Order we suspend the Bell Atlantic and US West transmittals, pursuant to our authority under Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), for the full five-month period allowed by this section, or until this investigation is concluded, whichever comes first. The issues designated for investigation are discussed below.

IV. PARTIES

9. The studies submitted by Bell Atlantic, US West, and Pac Bell address the effects of SFAS-106 on all local telephone companies subject to the price cap rules. In light of this, and also the fact that the Commission's price cap plan applies equally to all price cap LECs, the issue of the exogenous treatment of the costs associated with implementing SFAS-106 appears to be similar for all LECs subject to price caps. In the interest of fairness and efficiency, we believe that these issues should be considered in a single proceeding. We therefore make all price cap LECs parties to this proceeding, including those LECs who have not at this point sought exogenous treatment of the costs to implement SFAS-106. [12] Non-price cap LECs may participate in this proceeding as voluntary parties, as of course may other interested persons.

V. ISSUES DESIGNATED FOR INVESTIGATION

10. We hereby designate the following issues for investigation:

I. Have the LECs borne their burden of demonstrating that implementing SFAS-106 results in an exogenous cost change under the Commission's price cap rules?

II. If these cost changes are treated as exogenous,

(a) Should costs associated with implementation of SFAS-106 prior to January 1, 1993 (when the accounting change becomes mandatory) be treated as exogenous?

(b) Are the assumptions made by the individual LECs in calculating these costs reasonable?

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to Adopt Statement of Financial Accounting Standards No. 106, Employer's Accounting for Postretirement Benefits Other Than Pensions, AAD-80 (Dec. 26, 1991).

[5] United States Telephone Association (USTA), "Post-Retirement Health Care Study Comparison of TELCO Demographic and Economic Structures and Actuarial Basis to National Averages" (1992)(submitted in Bell Atlantic and US West transmittals); National Economic Research Associates, Inc. (NERA), "The Treatment of FAS-106 Accounting Changes Under FCC Price Cap Regulation" (1992)(submitted in Pac Bell transmittal).

[6] *LEC Price Cap Order*, 5 FCC Rcd at 6807.

[7] *Id., citing AT&T Price Cap Order*, 4 FCC Rcd at 3187.

[8] *See* 47 C.F.R. § 61.45(d).

[9] *AT&T Price Cap Reconsideration Order*, 6 FCC Rcd at 674; *LEC Price Cap Reconsideration Order*, 6 FCC Rcd 2663-65.

[10] As a result of implementing SFAS-106, Bell Atlantic seeks to increase its price cap index levels up to $49.7 million for the period January 1, 1991 through June 30, 1993. US West seeks to increase its price cap index levels up to $19.03 million for the period January 1, 1993 through June 30, 1993. Pac Bell seeks to increase its price cap index levels up to $27 million for the period January 1, 1993 through June 30, 1993.

[11] We do not suspend the Pac Bell tariff in this Order. *See supra* note 3.

[12] For a complete list of price cap LECs, *see* Appendix A.

(c) Given these assumptions, have the individual LECs correctly computed the exogenous cost changes?

(d) Are the individual LEC allocations of these costs among the price cap baskets consistent with Commission rules?

VI. DIRECT CASES

11. Since each LEC will presumably seek, as have Bell Atlantic, US West, and Pac Bell, to increase its price cap indexes to reflect implementation of SFAS-106, the burden of proof is on each LEC to show that the increase in its price cap index levels or its rates is just and reasonable.[13] Accordingly, each LEC party shall provide, as a part of its direct case, information it believes sufficient to bear its burden of proof. At a minimum, the following information should be provided in the LECs' direct cases: (1) the date the LEC has implemented or intends to implement SFAS-106; (2) the costs by year; (3) the allocation of costs to baskets by year;[14] (4) the treatment of these costs in reports to the Securities and Exchange Commission (SEC) and to shareholders, including specific citations to, or excerpted materials from, such reports; and (5) all studies on which the LEC seeks to rely in its demonstration that these accounting changes should be considered exogenous cost changes, including all studies demonstrating that the change is not reflected in the current price cap formulas, factors for inflation, productivity, allowed exogenous changes, initial price cap rates, and the sharing and low-end formula adjustment mechanisms.

12. In order to develop as complete a record as possible to resolve the issues designated for investigation, we provide below a list of more detailed information that is likely to be useful. This list is by no means intended to be exhaustive and is only intended to assist the parties in this proceeding in their preparation of direct cases, oppositions, comments, or rebuttals. We would welcome additional information not listed in this section that parties believe addresses the merits of the issues designated for investigation.

13. In particular, the LECs should describe: (1) each of the type of benefits being provided that is covered by the SFAS-106 accounting rules; (2) for 1991 and 1992, the pay-as-you-go level of expense associated with these benefits; (3) any Voluntary Employee Benefit Association (VEBA) trusts or other funding mechanisms for these expenses which were established prior to the adoption of SFAS-106; (4) the forms of postretirement benefit accrual accounting, if any, that were adopted within the regulated financial reporting before the adoption of price cap regulation; (5) what type and level of SFAS-106-type expense is reflected in current rates; and (6) what type and level of SFAS-106-type expense was reflected in the starting rates for price caps.

14. We also seek descriptions and justifications of the actuarial assumptions, and the assumptions unique to postretirement health care benefits, made in computing the SFAS106 expenses.[15] These assumptions should include, but are not limited to, the time value of money, participation rates, retirement age, per capita claims cost by age, health care cost trend rates, Medicare reimbursement rates, salary progression (if a company has a pay-related plan), and the probability of payment (turnover, dependency status, mortality, etc.). Parties and commenters should also discuss what assumptions, if any, were made about other future events such as capping or elimination of benefits, or the possible advent of national health insurance.

15. Further, since part of the growth in the GNP-PI presumably occurs due to growth in medical costs, we seek information on what adjustment, if any, should be made in the exogenous adjustment to avoid any double counting. If an adjustment has been made, parties and commenters should document how the adjustment was computed. Moreover, parties and commenters should describe and quantify any wage changes which will be reflected in the GNP-PI that are expected to occur as a result of the introduction of SFAS-106. In particular, parties and commenters should discuss what adjustment, if any, should be reflected in the exogenous adjustment for this change.

16. Finally, parties and commenters relying on the macroeconomic model used in the USTA study should fully describe and document the model, including the method of estimation, parameter estimates, and summary statistics. This same data should be submitted for any alternate functional forms which were modeled, including the data used to estimate the model, the data used in making forecasts from the model, and the results of any sensitivity analyses performed to determine the effect of using different assumptions.

VII. PROCEDURAL MATTERS

A. Filing Schedules

17. This investigation will be conducted as a notice and comment proceeding pursuant to Section 1.411 of the Commission's Rules, 47 C.F.R. § 1.411. CC Docket No. 92-101 has been assigned for this purpose. The carriers listed in Appendix A to this Order are designated as parties. These parties shall file their direct cases no later than June 1, 1992. The direct cases must present the parties' positions with respect to the issues described in this Order. The direct cases shall specifically reference (using the designations used in this Order) the issues designated in paragraph 10, the information sought in paragraph 11, and the additional information sought in paragraphs 12 through 16. Pleadings responding to the direct cases may be filed no later than July 1, 1992, and must be captioned "Opposition to Direct Case" or "Comments on Direct Case. " Parties may each file a "Rebuttal" to oppositions or comments no later than July 15, 1992.

18. An original and seven copies of all pleadings must be filed with the Secretary of the Commission. In addition, one copy must be delivered to the Commission's commercial copying firm, Downtown Copy Center, Room 246, 1919 M St., N.W., Washington, D.C. 20554. Members of the general public who wish to express their views in an

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[13] *See* 47 U.S.C. § 204(a).

[14] Those price cap LECs who have not yet filed tariffs implementing SFAS106 should submit good faith estimates of the costs outlined in (2) and (3) of this Section.

[15] These expenses are described in paragraphs 29 through 42 of SFAS-106.

informal manner regarding the issues in this investigation may do so by submitting one copy of their comments to the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Such comments must specify the docket number of this investigation.

19. All relevant and timely pleadings will be considered by the Commission. In reaching a decision, the Commission will take into account information and ideas not contained in pleadings, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of reliance on such information is noted in the Order.

B. Ex Parte Requirements

20. *Ex parte* contacts (*i.e.*, written or oral communications which address the procedural or substantive merits of the proceeding which are directed to any member, officer, or employee of the Commission who may reasonably be expected to be involved in the decisional process in this proceeding) are permitted in this proceeding until a public notice of scheduled Commission consideration of a final Order is released and after the final Order itself is issued. Written *ex parte* contacts must be filed on the day submitted with the Secretary and Commission employees receiving each presentation. For other requirements, *see generally* Section 1.1200 *et seq.* of the Commission's Rules, 47 C.F.R. §§ 1.1200 *et seq.*

C. Paperwork Reduction Act

21. The investigation established in this Order has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection, or recordkeeping, labeling, disclosure or other record retention requirements as contemplated under the statute. *See* 44 U.S.C. § 3502(4)(A).

VIII. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201(b), 203,204(a), 205, and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201(b), 203, 204(a), 205, and 403, that the issues set forth in this Order are DESIGNATED FOR INVESTIGATION.

23. IT IS FURTHER ORDERED that the carriers listed in Appendix A SHALL BE PARTIES to this proceeding.

24. IT IS FURTHER ORDERED that each LEC party SHALL PROVIDE, as a part of its direct case, information it believes sufficient to bear its burden of proof that the increase in its price cap index levels or its rates reflecting implementation of SFAS-106 is just and reasonable.

25. IT IS FURTHER ORDERED that Bell Atlantic Tariff F.C.C. No. 1, Transmittal 497 and US West Tariff F.C.C. Nos. 1 and 4, Transmittal 246 ARE SUSPENDED, pursuant to Section 204 of the Communications Act of 1934, 47 U.S.C. § 204, for five months beyond the time these tariffs would otherwise go into effect, or until this investigation is concluded, whichever comes first. The suspension period for the Bell Atlantic tariff shall end on December 2, 1992, and the suspension period for the US West tariff shall end on January 1, 1993.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

APPENDIX A

List of Local Exchange Carriers Subject to Price Cap Regulation

Ameritech Operating Companies

Bell Atlantic Telephone Companies

BellSouth Telecommunications, Inc.

GTE Telephone Operating Companies

GTE System Telephone Companies

Nevada Bell

NYNEX Telephone Companies

Pacific Bell

Rochester Telephone Corporation

Southern New England Telephone Company

Southwestern Bell Telephone Company

United Telephone System

US West Communications, Inc.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

TEMPO SATELLITE, INC. File No. DBS-88-04

For Construction Permit for New
Direct Broadcast System

MEMORANDUM OPINION AND ORDER

Adopted: February 20, 1992; Released: May 1, 1992

By the Commission:

INTRODUCTION AND BACKGROUND

1. We revisit here the application of TEMPO Satellite, Inc. ("TEMPO") to construct a Direct Broadcast Satellite ("DBS") system. In *Continental Satellite Corporation*, 4 FCC Rcd 6292 (1989)("*Continental*"), we deferred action on TEMPO's application pending further inquiry into certain matters raised by the petition to deny filed on June 17, 1988, by the National Association for Better Broadcasting and the Telecommunications Research and Action Center (collectively "NABB/TRAC").[1] We have compiled a comprehensive record in this proceeding and have thoroughly examined all outstanding issues raised against TEMPO's application for a conditional DBS construction permit. For the reasons set forth below, we find that TEMPO is basically qualified to hold an interim DBS authorization and thus we will grant its application. However, we will condition this grant in light of our specific concerns discussed below.

2. A brief description of TEMPO's DBS proposal can be found in our decision disposing of the other fifth-round DBS applicants.[2] TEMPO is a wholly owned subsidiary of TEMPO Enterprises, Inc., which is a wholly owned subsidiary of Tele-Communications, Inc. ("TCI"), a publicly held company engaged primarily in the cable television business with holdings in related distribution and programming services. In its petition to deny, NABB/TRAC raised potentially serious questions regarding TEMPO's fitness to be a DBS licensee in light of the adjudicated misconduct of its parent, TCI, in the Jefferson City cable franchise renewal case.[3] NABB/TRAC cited that case as evidence that TCI, and hence TEMPO, lack the requisite character qualifications to be a DBS permittee.[4] On August 2, 1989, the Mass Media Bureau sent TEMPO a letter which sought additional information concerning TCI's conduct and solicited further arguments regarding its relevance to and impact on the subject application.[5] TEMPO filed its comprehensive response to the Bureau's inquiry on October 2, 1989. NABB/TRAC thereafter filed reply comments. On May 10, 1991, the parties jointly filed a petition for approval of their settlement agreement and NABB/TRAC requested approval of the withdrawal of its petition to deny. Consistent with Commission policy, the settlement agreement and withdrawal was approved by the Mass Media Bureau on November 4, 1991, but the Bureau indicated that its action was not to be construed as resolv-

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[1] Also in *Continental*, we held in reserve the orbit/spectrum resource (11 pairs of half-CONUS channels) required to satisfy TEMPO's service proposal pending final action on its application. *Id.* at 6299, 6300 n. 43. On September 14, 1989, TEMPO filed a "Petition for Reconsideration and Clarification" of our decision in *Continental*. First, TEMPO sought clarification on whether it could move forward with a "due diligence" showing under Section 100.19 of the Commission's Rules (47 C.F.R. § 100.19(b)), and secure orbital positions and channels although the outstanding petition to deny remained pending. While its clarification request remained unresolved, TEMPO, on February 22, 1990, filed its first-component due diligence showing. Advanced Communications Corporation ("Advanced") and EchoStar Satellite Corporation ("EchoStar") have submitted comments opposing TEMPO's due diligence filing and have raised the issue of TEMPO's standing to request orbital positions and channels before it obtains a DBS construction permit. These channel/orbit requests are processed in the order in which they are received. The Mass Media Bureau has commenced processing of TEMPO's due diligence filing. The Commission will address TEMPO's ability to file a due diligence showing as a separate matter. Second, in its petition for reconsideration, TEMPO sought modification of the Commission's orbit/channel allocation plan so as to provide assurance that full-CONUS service from an eastern orbital position at 61.5^0W in combination with certain western orbital positions can provide unconstrained nationwide DBS service. TEMPO also raised this issue in its petition for reconsideration of our decision assigning orbital positions and channels to Advanced and Hughes Communications Galaxy, Inc. ("Hughes").*Advanced Communications Corp.*, 6 FCC Rcd 2269 (1991). We have addressed this issue in connection with the Advanced and Hughes proceeding. *See Advanced Communications Corp.*, 6 FCC Rcd 6977 (1991) (denying TEMPO's petition for reconsideration).

[2] *Continental*, 4 FCC Rcd at 6296. TEMPO has requested that the record be clarified regarding the Commission's indication that TEMPO will "provide half of its channels for 'free' and half on a subscription and/or pay-per-view basis." *Id.* TEMPO states, instead, that all of its services will be provided on a subscription basis consisting of multi-tiered programming.

[3] *Continental*, 4 FCC Rcd at 6299. In the Jefferson City case, a jury rendered a $35.6 million verdict against TCI on alternative damage awards for violation of federal antitrust law and tortious interference with business under Missouri law. For a complete recitation of the facts of that case, *see Central Telecommunications, Inc. v. TCI Cablevision*, 610 F.Supp. 891 (W.D. Mo. 1985), *aff'd*, 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987).

[4] *See Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986) (*"1986 Character Policy Statement"*)*on reconsideration*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Association for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987). *See also Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252 (1990) (*"1990 Character Policy Statement"*), *on reconsideration*, 6 FCC Rcd 3448 (1991), *petitions for further reconsideration pending*.

[5] Similarly, when the character question was raised by other petitioners in connection with TCI's acquisition in 1988 of TEMPO Enterprises, Inc., then a licensee of three broadcast stations, the Bureau, on November 23, 1988, directed a letter to TCI requesting additional information about the Jefferson City matter. Subsequent to that letter, TEMPO Enterprises' broadcast stations were transferred to other entities, mooting the issue. TCI, nevertheless, responded to the Bureau's letter, against which NABB/TRAC filed comments.

ing the issues before the Commission concerning TCI. Therefore, we will assess TEMPO's basic qualifications to hold a DBS permit in view of TCI's prior misconduct and the mitigating factors which we may take into account. We also address below other objections to TEMPO's application.[6]

DISCUSSION

3. *NABB/TRAC Petition.* Although the petition to deny has been withdrawn, we have fully considered the matters set forth therein.[7] We conclude from the record that the Jefferson City litigation raises *prima facie* questions regarding TCI's character qualifications, but there are no substantial and material questions of fact that would warrant any further inquiry on this matter. When an applicant's character qualifications have been called into question due to its adjudged violation of specific laws, the Commission will consider the following factors: (1) the willfulness of the misconduct; (2) the frequency of the offending behavior; (3) the time elapsed since the violation took place; (4) the seriousness of the misconduct; (5) the nature of the participation, if any, of managers and owners; (6) the efforts made to remedy or avoid the wrongdoing; and (7) the applicant's record of compliance with the Commission's rules and policies.[8]

4. Applying the first of these factors, it appears that at least some of the actions underlying the antitrust action were willfully engaged in by the individuals involved. With respect to frequency, there has been no local recurrence of the antitrust related activity. In fact, on February 16, 1988, Jefferson City renewed TCI's nonexclusive franchise for an additional elevenyear term. In this regard, TCI refers to an unsolicited letter, dated April 14, 1989, from Bob Weber, Chairman of the Cable Quality Commission of Jefferson City, which describes TCI's performance as follows:

> TCI is rapidly becoming one of our community's best business partners.
>
> Responsiveness, cooperation instead of confrontation, quality of service, and involvement in our community is "what it's all about!"

We also note that the Commission has not received any information of similar, relevant misconduct in relation to the franchise renewals of the other wholly owned TCI cable television systems, which encompass approximately 1700 community units. As for the passage of time since the incidents in Jefferson City, all events concerning the franchise renewal process occurred no later than April 1982, when TCI's franchise was renewed.

5. While the misbehavior was serious, the misconduct appears to have been substantially committed by one employee who acted on his own and is no longer with the company. This employee threatened to saturate the market with home satellite dishes if the franchise was not renewed and threatened a city consultant with the destruction of his career.[9] However, John C. Malone, President and Chief Executive Officer of TCI and President and Director of most of TCI's subsidiaries, has sworn that he has no recollection of having been informed and does not believe that he ever received contemporaneous information that any TCI employee threatened any individual or company in connection with the Jefferson City franchise renewal. He also avers that all legal actions undertaken by the company in connection with the Jefferson City franchise were brought in good faith in an attempt to seek judicial enforcement of TCI's legal rights to own and operate its cable system in Jefferson City and to provide service to its cable subscribers. Each of TCI's current principals involved in the Jefferson City franchise renewal has submitted individual, sworn statements to the same effect. There is no evidence before us that contradicts these unrebutted affidavits.

6. In addition, TCI has enacted an extensive antitrust compliance policy and established specific guidelines for employee behavior. The company has a written policy which communicates to employees that they are to conduct themselves in an ethical manner. TCI has increased the size of its legal department and has reorganized the company's corporate structure to define more clearly and to improve reporting and oversight functions. Significantly, TCI's antitrust compliance efforts were further strengthened pursuant to the terms of the settlement agreement with NABB/TRAC. Specifically, TCI updated its antitrust compliance policy and instituted a revised employee education program based upon discussions with petitioner's representatives. Also, TCI established a national ombudsman position at its corporate headquarters to respond to customer inquiries and complaints.

7. Finally, we note that there is no evidence before us in this proceeding that TCI has a pattern of not complying with Commission rules and policies. Accordingly, based on the foregoing, we conclude that the Jefferson City antitrust adjudication raises no substantial and material questions of fact regarding TEMPO's basic qualifications and that no further inquiry is warranted into this matter.

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[6] These other objections are: "Comments in Support of Petitions to Deny" filed June 14, 1990, by Home Shopping Network, Inc. ("HSN"), and certain letters filed June 14, 1991, and July 31, 1991, by the National Rural Telecommunications Cooperative ("NRTC"). TEMPO and TCI urge that HSN and NRTC lack standing to file these unauthorized and untimely pleadings. We agree. However, in our discretion, we will treat these pleadings as informal objections. 47 C.F.R. §73.3587.

[7] *See Abuses of the Commission's Processes*, 5 FCC Rcd at 3915 n.28; *Booth American Company*, 58 FCC 2d 553, 554 (1976); *Agreements Between Broadcast Licensees and the Public*, 57 FCC 2d 42, 53 (1975).

[8] *1986 Character Policy Statement*, 102 FCC 2d at 1227-28. The policies expressed in the Commission's broadcast character policy statement have been used as guidance when passing on the basic qualifications of nonbroadcast licensees. *See, e.g., Western Telecommunications, Inc.*, 3 FCC Rcd. 6405, 6406 and 6408 n.11 (1988); *Character Qualifications Recon.*, 1 FCC Rcd. at 424. Thus, we reject TCI's argument that our broadcast character policies are not relevant to the qualifications of a DBS applicant proposing to provide a nonbroadcast service.

[9] *See Central Telecommunications v. TCI Cablevision*, 610 F.Supp. at 895.

8. *Home Shopping Network "Comments"*. On June 14, 1990, Home Shopping Network, Inc. ("HSN"), a supplier of home shopping programming to broadcasters and cable television systems, filed "comments" in support of the petitions to deny TEMPO's application. HSN's objection attempts to set forth additional information, not previously made known to the Commission, which purportedly demonstrates TEMPO's unfitness to be a DBS licensee. Specifically, HSN asserts, in reply to TCI's October 2, 1989 "Response to Commission Letter of August 2, 1989, "that some of TCI's factual representations therein are "mischaracterizations" of TCI's behavior since its adjudicated antitrust violation in the Jefferson City case. Through its extensive experience with TCI subsequent to that case, HSN claims that TCI continues to engage in an aggressive, on-going campaign of antitrust violations primarily by denying HSN's programming access to TCI-owned cable systems. HSN argues that TCI's vertical integration into home shopping programming demonstrates that TCI's conduct in Jefferson City is not an isolated incident, but rather is part of a pattern of anticompetitive conduct directed by senior TCI officials.

9. We find that HSN's allegations do not justify further consideration in a hearing. First, any implication that the conduct noted by HSN breaches the Commission's character policy is unwarranted. The Commission has consistently refrained from making licensing decisions based on mere allegations of relevant non-FCC misconduct, even where those allegations have resulted in an indictment or are otherwise in the process of being adjudicated by another agency or court.[10] HSN does not contend that any of TCI's alleged anticompetitive acts against HSN have been adjudicated or that any action is even pending. Nor does HSN assert that any of the alleged conduct that it has experienced parallels or in anyway resembles the type of conduct for which TCI was found liable in Jefferson City, which might raise questions regarding the continuing relevance of that adjudication. In addition, HSN has failed to point out any specific "mischaracterizations" or misrepresentations that were made to the Commission in TCI's October 2, 1989 response to the Commission's inquiry into the Jefferson City case. Accordingly, HSN's pleading fails to make a *prima facie* case and will be denied.

10. Second, we note that the same vertical integration concerns regarding distribution and programming relationships which are now raised by HSN were rejected in our initial decision addressing TEMPO's qualifications. In *Continental*, the Commission denied various petitions which alleged that TCI's concentration of control in the video services marketplace has, among other things, led TCI to use its considerable market power and interests in programming sources to negotiate preferential or exclusive programming contracts, thereby preventing alternative outlets and programmers from competing effectively, or at all.[11] In rejecting these arguments, we stated that "TEMPO's participation [in the DBS industry] could well accelerate the initiation of DBS service by bringing valuable marketplace experience and presence and possibly enhancing access to programming" and that "existing antitrust law and Commission oversight are sufficient to prevent any conduct that is illegal or deleterious to the DBS industry and its customers, or to operators and customers in the other video entertainment distribution industries as well."[12] Consistent with this approach, we again stressed reliance on antitrust law in recommending to Congress, subsequent to *Continental*, that "to promote the emergence of alternative, effectively competitive multichannel distributors, Congress should reaffirm the applicability of traditional antitrust principals, including the general obligation of firms enjoying market power not to frustrate the emergence of effective competition."[13]

11. Although HSN's allegations accordingly do not warrant further investigation in a hearing, we believe that legitimate competitive concerns do exist regarding the relationship between TEMPO's proposed DBS service and TCI's cable service. We have long anticipated that the DBS service, along with other multichannel video technologies, will provide an effective, competitive alternative to cable television.[14] As stated in our July 1990 Cable Report to Congress, "cable participants in DBS should have considerable incentive to use that medium to compete vigorously with other cable operators on a scale that would be otherwise unattainable. Nonetheless, developing relationships between cable and DBS should be monitored."[15] In this regard, while we continue to acknowledge the benefits of having an experienced video services provider such as TCI involved in the initial stages of DBS, we are somewhat troubled by particular aspects of TEMPO's marketing proposal. First, we note that TEMPO plans to provide stand-alone DBS service to homes which have no access to cable television and those households that are passed by cable but do not subscribe.[16] In these respects, TEMPO's proposed DBS service will contribute to a competitive multichannel video marketplace by offering new services to consumers who are unable or unwilling to subscribe to conventional cable service. However, TEMPO's application also states that it intends to offer its DBS service as an "ancillary service" to cable homes that want additional services.[17] Specifically, TEMPO's proposed system would be structured in such a manner that cable operators would be able to elect to provide their subscribers with TEMPO's DBS service as an "expanded tier" of programming, thereby allowing cable systems to augment their existing services with additional DBS offerings via an earth station at the subscriber's home.[18] According to TEMPO, this marketing approach would alleviate channel space limitations

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[10] *1986 Character Policy Statement*, 102 FCC 2d at 1204-05; *1990 Character Policy Statement*, 5 FCC Rcd at 3252, *on reconsideration*, 6 FCC Rcd at 3448. *See, e.g., Charlotte L. Olive*, 6 FCC Rcd 4993 (1991), *appeal dismissed sub nom. Mosely v. FCC*, No. 91-1459 (D.C. Cir. February 27, 1992).

[11] *Continental*, 4 FCC Rcd at 6298.

[12] *Id.* at 6299.

[13] *1990 Cable Report*, 5 FCC Rcd 4962, 5031 (1990).

[14] *Id.* at 5017-18.

[15] *Id.* at 5018. When the Commission first promulgated the interim DBS rules and policies, it expressly retained the option of imposing restrictions on cross-ownership in particular localities in the event that early experience with DBS indicates that concentration of control in such localities limits viewers' access to information and programming. *See Direct Broadcast Satellites*, 90 FCC 2d 676, 713 (1982), *aff'd in part, National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1206-09 (D.C. Cir. 1984).

[16] *See* TEMPO Application at 10-11. TEMPO states that, in addition to marketing the service to existing C-Band home satellite dish subscribers, "A nationwide marketing and operations effort will be initiated [sic] directed at both cable and non-cable customers." *Id.* at 14.

[17] TEMPO Application at 9.

[18] TEMPO Application at 9, 11.

on cable systems, allowing operators to devote some channel capacity on their systems to local and regional services while serving subscribers with national program services via DBS.[19] In this connection, TEMPO states that TCI's "affiliated [cable] systems will provide a base of subscribers for the service."[20]

12. In furtherance of a competitive environment in both the cable and DBS industries, we are concerned that TEMPO not be allowed to market its proposed DBS service to existing TCI cable subscribers exclusively or primarily as an ancillary, expanded tier of cable service. Such a result would seriously undermine one of our principal goals in regulating the multichannel video marketplace -- promoting effective competition to cable. Accordingly, although we otherwise approve TEMPO's DBS application, we are imposing a condition on TEMPO's construction permit (and will also do so on any DBS license it receives) that, in areas served by TCI-affiliated cable systems, TEMPO or any related entities: (1) shall not offer or provide its DBS service to subscribers of TCI-affiliated cable systems exclusively or primarily as an ancillary or supplementary cable service;[21] and (2) shall not offer or provide its DBS service in a manner that would allow subscribers of TCI-affiliated cable systems to receive TEMPO's DBS service under terms and conditions different from those offered or provided to consumers who are not subscribers to TCI-affiliated cable systems.[22] This condition will leave TEMPO considerable discretion in carrying out its DBS service offering as proposed in its application, while at the same time ensuring that multichannel competition to cable is fostered, not hindered.[23]

13. *NRTC Objections.* On June 14, 1991, the National Rural Telecommunications Cooperative ("NRTC")[24] filed a letter requesting that we hold in abeyance any action approving the DBS construction permit application of TEMPO pending review of its qualifications in light of the Commission's recent report to Congress on the discrimination by satellite carriers against home satellite dish programming distributors.[25] NRTC also believes that any action concerning TEMPO's application should be deferred pending the resolution of NRTC's formal complaints filed against Southern Satellite Systems, Inc. ("Southern") and Netlink USA ("Netlink"), alleging unlawful discrimination in the provision of satellite carrier services in violation of Section 202 of the Communications Act.[26] Southern and Netlink are satellite carriers owned in whole or part by TCI. NRTC believes that the alleged misconduct of Southern and Netlink bears directly upon TEMPO's qualifications to be a DBS licensee.[27] NRTC also argues that the record developed in the Commission's discrimination inquiry, portions of which were not made public, contains specific information regarding "broadcast-related anticompetitive and discriminatory conduct by Southern and Netlink" and that any approval of TEMPO's application without taking official notice of this information would be inconsistent with the public interest.

14. We do not find that action on TEMPO's DBS application should be further suspended pending further inquiry into the matters raised in the *Discrimination Report.* In the *Discrimination Report,* without identifying specific satellite carriers, we recently concluded that, "as a general matter, there are significant disparities in some of the prices charged by some carriers to home dish distributors as compared to the prices charged to cable companies and other customers for superstation and network programming."[28] However, these were general conclusions and not specific adjudicated findings with regard to any particular satellite carrier or carriers. More significantly, the Commission specifically declined to conclude, based on the record before it, that there were any violations of the Communications Act.[29] Instead, further "remedial action" was deferred pending resolution of the many legal issues that remain with regard to the pending Section 208 complaints. As we noted, "the outcome of the complaints will depend on questions of fact and law that may vary from defendant to defendant.... Specific allegations of unlawful activity under the Communications Act will be evaluated in [those] complaints. . ."[30]

15. Because the development of DBS service is an important goal of the Commission, we decline to delay further TEMPO's application (which has been pending for three years) to await the outcome of the Section 208 complaint proceeding, particularly in light of the fact that that proceeding should be resolved well before TEMPO

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[19] TEMPO Application at 11, 18.

[20] TEMPO Application at 9-10. We note that TCI is the largest multiple system operator in the U.S. TCI-controlled cable systems, as of October 1991, passed approximately 15.3 million homes and served over 8.8 million (or 16%) of the nation's 53.9 million subscribers. *Cable and Station Coverage Atlas* at 4-5 (Warren Publishing, Inc. 1992); *Broadcasting,* October 14, 1991, at 53.

[21] For example, TEMPO would not be permitted to restrict the marketing of its DBS service primarily to TCI cable operators, who in turn would sell that service as an additional program offering to TCI cable subscribers. Other marketing techniques intended to achieve the same result would also be prohibited. *See Potential Uses of Certain Orbital Allocations by Operators in the Direct Broadcast Service,* 6 FCC Rcd 2581, 2583 (1991) (emphasizing the Commission's commitment to ensuring that DBS service is truly nationwide).

[22] This restriction, however, is not intended to preclude TEMPO from using legitimate sales practices, such as volume discounts, on a non-discriminatory basis.

[23] The condition imposed on TEMPO relates to the provision of its proposed DBS service to subscribers of TCI-affiliated cable systems, since these systems, according to TEMPO, are to provide an initial base of subscribers for its DBS service. *See* 11, *supra.* We fully anticipate, however, that TEMPO will also offer its DBS service in a competitive manner when marketing that service to subscribers of other, unaffiliated cable systems.

[24] NRTC and its members (rural electric cooperatives and rural telephone systems) distribute "RURAL TV" programming services to home satellite dish subscribers. On June 24, 1991, TCI filed a reply to NRTC's letter and NRTC responded to that on July 2, 1991.

[25] *Inquiry Into the Existence of Discrimination in the Provision of Superstation and Network Station Programming (Second Report),* 6 FCC Rcd 3312 (1991) (*"Discrimination Report"*).

[26] *See* 47 U.S.C. § 202; *National Rural Telecommunications Cooperative v. Southern Satellite Systems, Inc. and Netlink USA (Amended Formal Complaints),* File Nos. E-91-44, E-91-45, (filed April 26, 1991). NRTC's complaints were filed pursuant to Section 208 of the Communications Act. 47 U.S.C. § 208.

[27] NRTC cites the *1986 Character Policy Statement,* 102 FCC 2d 1179 (1986).

[28] *Discrimination Report,* 6 FCC Rcd at 3321.

[29] *Id.* at 3320.

[30] *Id.* at 3321.

begins to offer any DBS service. We will, however, condition this grant on the outcome in the complaint proceeding.

16. On July 31, 1991, NRTC filed another letter for the purpose of calling our attention to an unpublished decision of the United States District Court for the District of New Jersey, *PrimeTime 24 Joint Venture v. Telecable Nacional*, Civil Action No. 90-1941, Letter-Opinion (D.N.J. September 21, 1990). In that decision, the court rendered a default judgment against the defendant, Telecable Nacional, a Dominican Republic Corporation, whose 49-percent shareholder is a subsidiary of TCI.[31] Neither Telecable Nacional nor TCI attempted to defend this action.[32] In rendering its default judgment, the court found sufficient proof that the defendant's "acts of piracy" of the plaintiff's satellite signal violated Section 705 of the Communications Act, 47 U.S.C. § 605. NRTC alleges that this decision raises serious questions concerning the qualifications of any TCI-owned company to become a DBS licensee and calls for further inquiry. TCI filed a response on August 21, 1991, to which NRTC replied with a letter on September 9, 1991.

17. From the information provided by NRTC and TCI, we find that this matter does not affect TEMPO's qualifications. TCI has submitted a statement indicating that it has no management responsibilities over Telecable Nacional, is unable to influence Telecable Nacional's operations and actions, and has no regular access to information about its day-to-day business operations. TCI has also stated that it has repeatedly notified Telecable Nacional that it should not engage in unauthorized reception and retransmission of satellite programming, and has been attempting for several years to sell its interest in Telecable Nacional. NRTC's latest letter, filed September 9, 1991, fails to contradict TCI's statements with any facts and only speculates that TCI has the power to take affirmative, concrete steps to terminate Telecable Nacional's illegal actions. In light of TCI's unrefuted statements, we conclude that there are no substantial and material questions of fact regarding involvement by TCI in the violation of Section 705 by Telecable Nacional. Accordingly, NRTC's request to hold TEMPO's application in abeyance pending further inquiry will be denied.[33]

CONCLUSION

18. Accordingly, IT IS ORDERED, That the pleadings filed by Home Shopping Network, Inc. and the National Rural Telecommunications Cooperative, treated as informal objections, ARE DENIED.

19. IT IS FURTHER ORDERED, That the DBS application of TEMPO Satellite, Inc. (File No. 88-04) is GRANTED IN PART to provide service from two or more satellites delivering 11 channels to each half of the continental United States, or from one or more satellites delivering 11 channels to the entire continental United States, as described in its application and in *Continental Satellite Corporation*, 4 FCC Rcd 6292 (1989), subject to the following provisions:

(a) This grant is conditioned as follows: That, in areas served by TCI-affiliated cable systems, TEMPO or any related entities (1) shall not offer or provide its DBS service to subscribers of TCI-affiliated cable systems exclusively or primarily as an ancillary or supplementary cable service; and (2) shall not offer or provide its DBS service in a manner that would allow subscribers of TCI-affiliated cable systems to receive TEMPO's DBS service under terms and conditions different from those offered or provided to consumers who are not subscribers to TCI-affiliated cable systems.

(b) This grant is conditioned on the outcome of the Commission's formal complaint proceeding in *National Rural Telecommunications Cooperative v. Southern Satellite Systems, Inc. and Netlink USA*, File Nos. E91-44 and E-91-45.

(c) This grant is conditioned on the outcome of any possible future criminal or civil proceedings regarding the involvement of TCI, its principals, or TCI-related entities in the activities of Capcom Financial Services, Inc. or in other matters which call into question TEMPO's qualifications to hold a DBS authorization.

(d) This grant does not include launch and/or operational authority for any phase of the proposal;

(e) This grant does not include the assignment of frequencies or orbital positions for any satellite; and

(f) The applicant will receive reservations for additional channels, up to the total number of channels necessary to fulfill the proposal in its application, if DBS allocations are surrendered by other permittees or cancelled by the Commission.

20. The Mass Media Bureau shall send a copy of this Order by Certified Mail--Return Receipt Requested, to each of the parties in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[31] Letter-Opinion at 9.

[32] While it appears that the plaintiff contacted TCI requesting that it enter into a Cable Service Agreement for reception of the plaintiff's signals, TCI was neither made a party to the suit nor served with a complaint.

[33] As a separate matter, we note that recent reports in the press have revealed that two of TCI's principals had a prior affiliation with Capcom Financial Services, Inc. ("Capcom"), a company which, during their affiliation, was indicted on money laundering charges in Tampa, Florida, along with the Bank of Credit and Commerce International ("BCCI"). *See, e.g., Washington Post*, September 29, 1991, at H1, col. 1; *Wall Street Journal*, January 17, 1992, at A4. While these two TCI officers have not been indicted, we will condition TEMPO's construction permit on the outcome of any possible future proceedings regarding the involvement of TCI principals in the activities of Capcom or other relevant misconduct. *See 1990 Character Policy Statement*, 5 FCC Rcd at 3253, *on reconsideration*, 6 FCC Rcd at 3449, 3451 n.2.

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 92-9

In the Matter of

Redevelopment of Spectrum to
Encourage Innovation in the
Use of New Telecommunications
Technologies

ORDER EXTENDING TIME FOR COMMENTS AND REPLY COMMENTS

Adopted: March 31, 1992; Released: April 1, 1992

Comment Date: June 5, 1992
Reply Comment Date: July 6, 1992

By the Office of Engineering and Technology:

1. On March 16, 1992, the American Petroleum Institute (API), joined by the Utilities Telecommunications Council (UTC), the Association of American Railroads (AAR), and the Larger Public Power Council (LPPC), filed a *Motion for Extension of Time* (*Motion*) requesting that the time for filing comments and reply comments to the Commission's *Notice of Proposed Rule Making* (*Notice*) in the above captioned proceeding be extended two months to June 22, 1992, and July 21, 1992, respectively.

2. API states that this extension is warranted for the following reasons: (1) it has encountered delay in obtaining the Commission data bases from the National Technical Information Service (the Commission's data service contractor) needed to fully review the spectrum study performed by the Commission's Office of Engineering and Technology; (2) it needs additional time to fully analyze the impact on existing fixed microwave operations of the proposals made in the *Notice;* (3) it needs more time to analyze adequately the Final Acts of the World Administrative Radio Conference, 1992, which adjourned on March 3, 1992; and, (4) it needs more time needed to review adequately the voluminous comments filed in other Commission proceedings that are relevant to this proceeding.[1]

3. Oppositions to API's *Motion* were filed by Time Warner Telecommunications Inc. (TWT) and Cox Enterprises, Inc. (Cox). TWT argues that the requirement for spectrum to satisfy the needs of emerging technologies is long-standing and urgent, and that a delay in this proceeding would not serve the public interest because it would delay initiation of new services to the public and harm efforts by U.S. entities to compete in the global marketplace. Cox argues that the Commission has provided an adequate amount of time for interested parties to comment on the *Notice* and that it is not in the public interest to delay this proceeding because of the adverse impact delay would have in the health and growth of the national economy.

4. The Commission does not routinely grant extensions of time.[2] However, due to the complexity of the issues and the apparent difficulty encountered by API in obtaining relevant data, we believe that in this instance a limited extension of time is warranted. Additional time will serve the public interest in ensuring a comprehensive and thorough examination of the complex issues raised by the proposals made in the *Notice* and their relationship to other pending proceedings, and not appreciably delay Commission consideration of this proceeding. An additional forty-five days will provide adequate time for interested parties to obtain and analyze relevant information and file comments. Accordingly, IT IS ORDERED THAT the deadline for filing comments and reply comments IS EXTENDED to June 5, 1992, and July 6, 1992, respectively.

5. This action is taken pursuant to authority found in Sections 4(i), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g), and 303(r) and pursuant to Sections 0.31, 0.241, and 1.46 of the Commission's Rules, 47 C.F.R. Sections 0.31, 0.241, and 1.46.

6. For further information concerning this rule making contact Mr. Fred Lee Thomas, Office of Engineering and Technology, (202) 653-6204.

FEDERAL COMMUNICATIONS COMMISSION

Bruce A. Franca
Acting Chief Engineer

[1] *See Notice of Inquiry*, GEN Docket No. 90-314, 5 FCC RCD 3995 (1990); *see also Policy Statement and Order*, GEN Docket No. 90-314, 6 FCC Rcd 6601 (1991).
[2] 47 C.F.R. § 1.46.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Part 68 File No. 1179-CX-92
Application of Protel, Inc.
for Registration of Credit Card/Coin
Telephone

ORDER

Adopted: April 21, 1992; Released: April 23, 1992

By the Chief, Domestic Services Branch, Common Carrier Bureau

1. On April 15, 1992 we placed on Public Notice an application to register a credit card/coin phone by Protel, Inc. This device is a non-instrument-implemented terminal equipment designed for connection to telephone company coin service under a limited waiver of Part 68 for use under the particular circumstances of California's consent decree. (*See* Limited Waiver letter to California P. U. C. from Chief, Common Carrier Bureau, dated 27 August 1991.)

2. We have received a timely motion for extension of time for filing comments on this application from Pacific Bell (Pacific). Pacific notes that this is the first time the Commission has received an application for a non-instrument-implemented telephone of this type. Pacific requests an extension of 14 days in which to file comments in order to allow the application to be examined by its technical departments because of the novel nature of the application in order to assure that no harm to the network can be caused by this telephone. For good cause shown, we will grant the requested extension.

3. Accordingly, pursuant to authority delegated in Section 0.291 of the Commission's Rules and Regulations, 47 C.F.R. § 0.291, IT IS HEREBY ORDERED, That the request for extension of time of 14 days for filing comments on the Protel application IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Abraham A. Leib
Chief, Domestic Services Branch
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE
April 15, 1992

Released: April 15, 1992

COMMON CARRIER BUREAU SOLICITS COMMENTS REGARDING NORMALIZATION OF EARNINGS REPORTED ON FORM 492 FOR COMPUTATION OF SHARING UNDER PRICE CAPS

COMMENTS DUE: May 5, 1992
REPLY COMMENTS DUE: May 15, 1992

On February 11, 1992, Bell Atlantic filed a Petition to Normalize Financial Results as reported in its Form 492. In this Petition, Bell Atlantic requests to be allowed to normalize its calendar 1990 and 1991 results to correct for the mismatch between expenses and revenues which occurs due to the annualized rate treatment of exogenous costs for Inside Wire Amortization (ISW), Subscriber Plant Factor (SPF) phasedown, Dial Equipment Minute transition (DEM), and Transitional Support (TRS) amounts. This petition appears to be a request for waiver of the instructions for Form 492.

Failure to normalize earnings, Bell Atlantic claims, would result in its earnings for 1991 being erroneously overstated, which would result in an overstatement of its sharing obligation under the price cap rules. Bell Atlantic also notes that, for similar reasons, there will be continued mismatches between revenues and expenses into at least 1994, and suggests that the Commission should consider whether to require continued normalization of these changes.

Bell Atlantic proposes a four-step process to normalize its revenues.[1] First, it calculates the mismatch of exogenous costs and revenues caused by the blended year treatment of the exogenous changes. Second, it recalculates the exogenous changes for 1991 to remove the blended year effect and adjusts its price cap indexes (PCIs) and rates to reflect these new PCIs. Third, these adjusted rates are applied to actual demand for the first six months of 1991 to determine the revenues Bell Atlantic would have earned for that period. Finally, these computed revenues are subtracted from actual billed revenues for the first six months of 1991. This difference is the revenue to be normalized. Bell Atlantic computes this amount for the first half of 1991 to be $17.6 million.

Comment is requested from interested parties on whether the Commission should allow the normalization Bell Atlantic requests. Interested parties should also address to what extent this is a problem for other carriers. The data Bell Atlantic provides indicates that a primary source of the mismatch is TRS.[2] Because some carriers are recipients and some contributors of TRS, comment is requested on the effect on earnings of the normalization for these two classes of carriers.

Comment is also requested on the method which should be used to effect any normalization. Interested parties should assess Bell Atlantic's proposed menthod, specifically regarding its proposal to normalize only the first half of the calendar year in the initial Form 492, while not normalizing the second half of the year until the final Form 492 a year later.

When the Commission mandated annualized treatment of the exogenous changes for ISW and Reserve Deficiency Amortizations (RDA), it noted that this might result in a mismatch between expenses and revenues.[3] To prevent this, the Commission directed carriers to normalize these amortizations by booking to Account 1439, Deferred Charges, the excess amortization expenses during the amortization period, and charging the deferred amount to expense over the remainder of the tariff year. Comment is requested on the applicability of this deferral and amortization methodology to normalize costs in the areas cited by Bell Atlantic. Commenters should also address whether this method of normalization in these areas should be reflected in the revised FCC Form 492 reports retroactive to July 1, 1990.

Interested parties may express their views by filing comments with the Secretary, Federal Communications Commission, Washington, D.C., 20554, not later than May 5, 1992. Reply comments may be filed not later than May 15, 1992. Parties shall file an original and four copies of all comments, replies, and supporting documents. In addition, parties should file two copies of any such pleadings with the Chief, Tariff Division, Common Carrier Bureau, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Parties also should file one copy of any such pleadings with Downtown Copy Center, the Commission's duplicating contractor, at its office in Room 246, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Chris Frentrup (202) 632-6312 of the Common Carrier Bureau, Tariff Division.

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[1] *Id.* at 1-1 and 1-2.

[2] Indeed, Bell Atlantic notes that the mismatch is especially severe in its case because it pays 40 percent of the total TRS. *Id.* at 3, note 7.

[3] Policy and Rules Concerning Rates for Dominant Carriers, 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order*) at para 82.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-90

In the Matter of

The Telephone Consumer
Protection Act of 1991

NOTICE OF PROPOSED RULEMAKING

Comment date: May 26, 1992
Reply date: June 25, 1992

Adopted: April 10, 1992; Released: April 17, 1992

I. INTRODUCTION.

1. On December 20, 1991 the Telephone Consumer Protection Act of 1991 (TCPA) was enacted, Public Law 102-243. The TCPA amends Title II of the Communications Act of 1934, 47 U.S.C. § 201 *et seq.*, by adding a new section, 47 U.S.C. § 227, which among other things, restricts the use of automatic telephone dialing systems and telephone facsimile machines for telemarketing purposes.[1] The Commission hereby initiates the notice of proposed rulemaking mandated by the statute, proposes implementing regulations, and tentatively defines the contours of statutorily permissible exemptions to the prohibitions of the statute. The Commission seeks comment on its tentative proposals.

II. SUMMARY OF THE LEGISLATION.

2. *Auto dialers.* Section 227 defines automatic telephone dialing systems, also known as auto dialers, as equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.[2] The section prohibits any person from making any call (other than a call made for emergency purposes or made with the prior consent of the called party) to residences using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party. The Commission is authorized to propose exemptions to this prohibition. Auto dialer calls are also prohibited to: emergency telephone lines, telephone lines of a guest room or patient room of a hospital or similar establishment, telephone numbers assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call. In addition, the use of an auto-dialer in such a way that two or more lines of a multi-line business are engaged simultaneously is prohibited. The Commission is authorized to adopt implementing regulations.

3. *Facsimile (fax) machines.* The TCPA prohibits the use of any fax machine, computer, or other device to send an unsolicited advertisement to a fax machine.

4. *Telephone Solicitation to Residential Subscribers.* The TCPA provides that the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The Commission shall consider alternatives in protecting such privacy rights.[3]

5. *Technical Requirements on Equipment.* Section 227(d) prohibits sending any telephone facsimile message unless the message clearly marks, at the top or bottom of each page or on the first page, the date and time it is sent and an identification of the sender, including the telephone number of the sending machine. Any facsimile machine manufactured one year after the date of enactment must clearly mark this identifying information on the message. Similarly, all auto-dialer systems must state clearly at the beginning of the message the identity of the caller including a telephone number or address. In addition, any autodialer-system must release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up.[4]

6. *Private Right of Action and Affirmative Defenses to Liability.* Section 227(b)(3) authorizes private rights of action in state courts for a violation of the auto dialer or fax prohibitions. Similarly, Section 227 (c)(5) empowers a person who has received more than one telephone call in violation of any rules the Commission adopts regarding residential telephone subscribers' privacy rights under the TCPA, to bring in an appropriate state court an action to enjoin the practice, to receive money damages, or both. In addition, a complaint may be filed at the Commission based on a violation of Section 227 of the Communications Act of 1934, 47 U.S.C. § 227, or the regulations adopted thereunder.

III. DISCUSSION

A. INTRODUCTION.

7. In this proceeding the Commission proposes general implementing regulations, exemptions to the applicability of the statute's prohibited uses, and technical requirements applicable to auto-dialers and facsimile machines. The full text of the rules as proposed by this notice is found in Appendix B. In addition, this rulemaking proceeding addresses issues regarding the protection of residential privacy rights from unsolicited advertising over the telephone network, generally. We shall address each of these subject areas in turn.

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[1] The full text of the TCPA is provided at Appendix A.
[2] 47 U.S.C. § 227 (a)(1).
[3] *See infra* paras. 22-34.
[4] 47 U.S.C. § 227(d)(1)-(3).

B. PROHIBITED USES OF AUTO DIALERS.

8. *Implementing Regulations.* The general prohibition rules as proposed in Appendix B, section 64.1100, follow closely the language of the TCPA. Auto dialer calls are prohibited to: residential telephone lines without the consent of the called party, emergency telephone lines, the telephone line of a guest room of a health care facility, a paging service or other specialized mobile radio service, and any service for which the called party is charged for the call. Use of a facsimile machine to send an unsolicited advertisement is also prohibited. The Commission seeks comment on these proposed rules. The Commission also seeks comment on whether auto dialers have the technical capacity to avoid calling prohibited telephone numbers.

C. EXCEPTIONS TO PROHIBITED USES OF AUTO DIALERS.

9. The overall intent of Section 227 is to protect consumers from unrestricted telemarketing, which can be an intrusive invasion of privacy. TCPA states that individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.[5] It appears that there are many valuable uses to auto dialer messaging that do not necessarily fall within the intended scope of Section 227's prohibitions. For example, it appears that some utilities use auto dialers to deliver recorded messages to customers regarding scheduled maintenance, turn-off reminders, or scheduled power shortages. Thus, Section 227(b)(2)(B) of the TCPA states that the Commission may exempt from the prohibited use of auto dialers:

> (i) calls that are not made for a commercial purpose; and
>
> (ii) such classes or categories of calls made for commercial purposes as the Commission determines
>
> > (I) will not adversely affect the privacy rights that this section is intended to protect; and
> >
> > (II) do not include the transmission of any unsolicited advertisement.

In keeping with this authority the Commission proposes below to exempt from liability categories of auto dialer calls that were not intended to be prohibited by the TCPA and do not constitute a risk to public safety or an undue burden upon privacy interests. We recognize that some types of calls may fall into more than one exemption category. The exemption categories proposed are meant to be descriptive of current applications and also to encompass future similar services. Although the Commission proposes to exempt certain kinds of calls from the statutory prohibitions of the TCPA, the other statutory provisions of the TCPA establishing technical and procedural requirements (*e.g.*, § 227(d)(3)) do apply to the exempted categories. The Commission also seeks comment on whether exceptions to the autodialer prohibitions may lead to abuse.

10. *Non-commercial calls.* Auto dialers may sometimes be used to deliver non-commercial messages. The Commission tentatively finds that it is not the intent of the TCPA to prohibit or restrict such non-telemarketing uses of auto dialers. The TCPA expressly contemplates that the Commission would consider such an exemption.[6] The Commission proposes to exempt from the TCPA such non-commercial uses for auto dialers as: calls by civic institutions, local, state, or federal governments, political campaigns and other non-commercial institutions.[7] Such communications, whether or not from a tax-exempt organization, generally seek to advise the public of matters of civic concern, political contributions or elections, or other matters of public interest, which fall outside of the types of commercial telemarketing activity the TCPA seeks to regulate. The Commission seeks comment and analysis regarding the proposed exception.

11. *Commercial calls that do not transmit an advertisement.* The Commission proposes to exempt from the prohibitions of Section 227 commercial messages that do not include the transmission of any unsolicited advertisement.[8] Some messages, albeit commercial in nature, do not seek to sell a product or service and do not tread heavily upon privacy concerns. In keeping with the intent of Section 227 and in accordance with the authority expressed in the TCPA, the Commission proposes to exempt by rule from the prohibitions of the statute commercial calls that do not include the transmission of any unsolicited advertisement. For example, a large business may wish to use an auto dialer to advise its employees of a late opening time due to weather; or a nationwide organization may wish to remind members of an upcoming meeting or change in schedule. It appears that auto dialer messages are also being used by catalogue or delivery companies to confirm the arrival, shipment or delivery date of a product to a customer. Such informational calls do not offer a product or service to the called party and are an efficient method to communicate a message to a large number of people. The Commission seeks comment on this proposed exemption.

12. *Calls by tax exempt nonprofit organizations.* The TCPA primarily seeks to protect subscribers from unrestricted commercial telemarketing activities.[9] Tax exempt nonprofit organizations by definition are not seeking to make a profit on the sale of goods to the called party in a way that the TCPA was attempting to restrict. Tax and other federal and state laws often provide nonprofit organizations more advantageous treatment than

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[5] TCPA, Finding number (9).
[6] 47 U.S.C. § 227 (b)(2)(B)(i).
[7] *See* Appendix B § 64.1100(c)(1).
[8] *Id.* at § 64.1100 (c)(2).
[9] *See* TCPA, Finding number (13):

> While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for *noncommercial* calls, consistent with the free speech protections embodied in the First Amendment of the Constitution. (emphasis added).

commercial interests, and we believe it appropriate to reflect this public policy in our initial implementing rules. Moreover, the TCPA includes an exception to the definition of "telephone solicitation" for live operator calls by a tax exempt nonprofit organization.[10] The TCPA does not specify whether such an exemption applies to auto dialer calls. Therefore, the Commission proposes an exemption from liability for auto dialer calls by tax exempt nonprofit institutions.[11]

13. *Calls to Former or Existing Clientel* e . If a party already has chosen to do business with a particular caller, a contact by that caller to offer additional products or services is not as intrusive as a call from a business with whom the called party has no relationship. It appears that complaints are most often generated by auto dialer calls that are "cold contacts" to the called party. However, it is unclear under the TCPA whether a prior or existing business relationship with the called party authorizes an auto dialer call to that party. The TCPA includes an exception to the definition of telephone solicitations for calls to any person with whom the caller has an established business relationship. "[12] The auto dialer prohibitions in the TCPA do not incorporate the term "telephone solicitation". Instead, the auto dialer prohibitions refer to the "use of an artificial or prerecorded voice to deliver a message".[13]

14. The Commission tentatively concludes that the privacy rights the TCPA intends to protect are not adversely affected where the called party has or had a voluntary business relationship with the caller. Therefore, the Commission proposes an exemption to liability for calls placed by a caller, or on behalf of a caller, to its clientele.[14] The Commission notes that the legislative history of this section reflects various interpretations of the scope of this exemption and the definition of "business relationship". The Commission seeks comment on whether this exemption should encompass prior, current, or both prior and current customers of a business. How should "prior" and "current" be distinguished? We also seek comment on the definition of what qualifies as a "business relationship". Although a business relationship may sometimes exist without the exchange of consideration between the parties, we initially note that a business relationship requires a voluntary two way communication between the client and the business. Thus, we tentatively reject any interpretation of the term "business relationship" which would be based solely on a prior solicitation from the caller to a prospective customer. The Commission seeks comment on this exemption.

15. It appears that some businesses are using auto dialers to improve the efficiency of their debt collection practices. In such applications the auto dialer either delivers a payment reminder to the customer or, frequently, the auto dialer dials up customers and immediately delivers answered calls to a live collection representative. The latter use is generally termed a predictive dialer; predictive dialers sometimes deliver a recorded message to a small percentage of called parties when all live operators are busy. The use of auto dialers in debt collection increases the efficiency of the collector who no longer has to deal with unanswered calls, and is beneficial to the called party by making them aware of the company's inquiry. To the extent such practices comply with all other state or federal debt collection laws, it appears that this is a non-telemarketing use of auto dialers not intended to be prohibited by the TCPA. Although debt collection calls do not offer products or services, they are indeed commercial in nature and do not fall under the proposed exemption for non-commercial calls. Some companies have suggested there is a need for an exemption from liability for debt collection calls.

16. In all debt collection circumstances, a prior or existing business relationship took place between the caller and the called party or the calling party is acting in an agency capacity for the creditor. We tentatively conclude that a debt collection call, that otherwise complies with all applicable collection statutes, is a commercial call that does not adversely affect the privacy concerns the TCPA seeks to protect. It does not convey an advertisement or solicitation and is not a "cold contact" to a potential customer base. Such calls also fall under our proposed exemption for commercial calls that do not offer a product or service and do not adversely affect privacy concerns. In addition, where a company contracts with another company for debt collection services, the collection company acts on behalf of the company holding the debt. Under such circumstances the collection company becomes a party to the relationship between the company holding the debt and the called party and the "business relationship" exemption would apply to allow an auto dialer call to former or current clientele. Thus, a separate express exemption for debt collection calls is not necessary. We seek comment on this interpretation.

17. *Emergency auto dialer calls.* The TCPA expressly exempts from the category of prohibited calls, "call[s] made for emergency purposes."[15] It is necessary to discuss the scope of such a limitation and how the term "emergency" should be interpreted. The legislative history of the TCPA indicates a congressional intent to interpret the term "emergency" broadly rather than narrowly. During the house floor debate on the final version of S. 1462, later the TCPA, Congressman Markey, a sponsor of the legislation and Chairman of the House Telecommunications and Finance Subcommittee, stated that:

> The term "emergency purposes" is also intended to include any automated telephone call that notifies consumers of impending or current power outages, whether these outages are for scheduled maintenance, unscheduled outages caused by storms, or power interruptions for load management programs.[16]

In keeping with the legislative history and the intent of the TCPA, the Commission proposes to interpret "emergency" to include situations in which it is in the public interest to convey information to consumers concerning health or safety, whether or not the event was anticipated or could have been anticipated. We seek comment on this interpretation of the term "emergency purposes".

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[10] 47 U.S.C. § 227 (a)(3).
[11] *See* Appendix B § 64.1100(c)(4).
[12] 47 U.S.C. § 227 (a)(3).
[13] 47 U.S.C. § 227 (b)(1)(B).
[14] *See* Appendix B § 64.1100(c)(3).
[15] 47 U.S.C. § 227 (b)(1)(A).
[16] Congressional Record, November 26, 1991, H 11310.

D. AUTO DIALER SOLICITATIONS TO BUSINESSES.

18. The TCPA expressly prohibits unconsented to auto dialer calls to residences, subject to the exemptions to be adopted by the Commission. Regarding auto dialer calls to businesses the TCPA states that:

> [T]he Commission shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent.[17]

19. This matter must be analyzed in the context of other provisions of the TCPA regarding auto dialer calls to businesses. The TCPA expressly prohibits auto dialer calls:

> (i) to any emergency telephone line (including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);
>
> (ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or
>
> (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call....[18]

The broad prohibitions appear to address all circumstances under which an auto dialer call could compromise health and safety. Thus, further regulation of auto dialer calls in the business setting would not be a question of health and safety, nor even of a charge for the call, but instead an issue of privacy. The privacy interests at stake when a business receives an auto dialer call are different than when such a call is delivered to a residence. The Commission must balance the commercial speech objectives of advertisers with the privacy concerns of businesses. The Commission seeks comment on whether the privacy concerns of businesses are already adequately addressed by the TCPA by providing special protections for health and safety business organizations and by restricting the seizing of multi-party lines.

E. TECHNICAL AND PROCEDURAL STANDARDS.

20. *Facsimile Machines.* The new Section 227(d) states that it shall be unlawful to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.[19] This requirement applies across the board to all facsimile messages regardless of the content of the text. The TCPA mandates the Commission to revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after the date of enactment of this section clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual. As mandated by the statute, we propose to amend Part 68 of the Commission's rules to incorporate this requirement.[20]

21. *Artificial or Prerecorded Voice Systems.* The Commission also is mandated to prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone.[21] The statute mandates that the standards shall require that:

> (A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and
>
> (B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

Accordingly, we propose to amend Part 64 of the Commission's rules to incorporate these requirements.[22] We seek comment on these proposed rules.[23]

F. TELEPHONE SOLICITATION TO RESIDENTIAL SUBSCRIBERS.

1. Introduction.

22. The TCPA states that the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. This proceeding encompasses live operator, auto dialer and any other call for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services. Specific regulatory options are set forth in subsection (2)

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17 47 U.S.C. § 227 (b)(2)(A).

18 47 U.S.C. § 227 (b)(1)(A)(i), (ii), and (iii).

19 47 U.S.C. § 227(d).

20 *See* Appendix B proposed amendments to 47 C.F.R. Parts 64 and 68.

21 47 U.S.C. § 227(d)(3).

22 *See* Appendix B proposed amendments to 47 C.F.R. Part 64.

23 Some interested parties in the debt collection industry have indicated that while the TCPA requires that all artificial or prerecorded telephone messages shall, at the beginning of the message, state clearly the identity of the entity initiating the call, the Fair Debt Collection Practices Act prohibits a collector from identifying his or her employer. *See* 15 U.S.C. § 1692c. The extent to which a message improperly identifies the caller under the Fair Debt Collection Practices Act is a question best addressed by the agency charged with administering that act -- the Federal Trade Commission. However, our tentative reading of the Fair Debt Collection Act indicates that debt collectors should be able to draft identification messages that comply with both statutes.

below. We ask for comment on these and other alternatives. The TCPA expressly states that telephone solicitation does not include a call or message:

> (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.[24]

23. The Commission last considered this issue in 1980.[25] At that time the Commission noted that since it appeared that only about three ercent of all unsolicited telephone calls are interstate, regulatory action would very likely affect only a small proportion of all unsolicited calls. The Commission concluded that under these circumstances, Commission regulation would not appear to be warranted. We now revisit the issue of solicitation under the guidelines of the TCPA. The Commission seeks comment concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations, whether local or interstate. The Commission also seeks comment on whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under 47 U.S.C. § 227 (a)(3). The Commission notes that the bulk of telephone solicitation complaints received by the FCC are in the auto dialer area. The Commission seeks comment on whether it is in the public interest to recognize the inherent difference in the nuisance factor of auto dialer calls as opposed to live solicitations.

24. In this regard we note that unsolicited sales calls generated $435,000,000,000 in sales in 1990 -- a more than four-fold increase since 1984.[26] Thus, many consumers find such contacts beneficial and actually purchase the goods and services offered. The Commission tentatively concludes that it is not in the public interest to eliminate this option for consumers. In 1991 the Commission received a total of 757 complaints regarding unsolicited telephone calls placed to telephone subscribers by automatic dialers. During that time period the Commission received only 74 complaints generated by live solicitations. Some of the complaints against auto dialers were directed not at the content of the message, but at the problem of line seizure, where the auto dialer did not release the called party's line for several seconds after the called party had hung up. The Commission's rules and the TCPA address the line seizure problem and require the auto dialer to release the line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

25. The legislative history of the TCPA also reflects the premise that auto dialer generated calls are more intrusive to the privacy concerns of the called party than live solicitations. For example, Chairman Markey notes that:

> [T]oday in America more than 300, 000 solicitors make more than 19 million calls every day, while some 75,000 stockbrokers make 1.5 billion telemarketing calls a year. Automatic dialing machines, on the other hand, have the capacity to call 20 million Americans during the course of a single day, with each individual machine delivering a prerecorded message to 1,000 homes.
>
> In addition, automatic dialing machines place calls randomly, meaning they sometimes call unlisted numbers, or numbers of hospitals, police and fire stations, causing public safety problems.[27]

Similarly, Congressman Rinaldo noted that:

> This bill also requires the F.C.C. to restrict only those categories of artificial or prerecorded voice calls which are made for commercial purposes and will affect the privacy rights that the bill intends to protect. [28] [29]

> P[I]t is clear that automated telephone calls that deliver an artificial or prerecorded voice message are more of a nuisance and a greater invasion of privacy than calls placed by "live" persons. These automated calls cannot interact with the customer except in preprogrammed ways, do not allow the caller to feel the frustration of the called party, [footnote omitted] fill an answering machine tape or a voice recording service, [footnote omitted] and do not disconnect the line even after the customer hangs up the telephone. [footnote omitted]. For all these reasons, it is legitimate and consistent with the Constitution to impose greater restriction on automated calls than on calls placed by "live persons."[30]

26. In addition to the fact that auto dialer calls generate the bulk of consumer telemarketing complaints, the majority of complaints filed at the Commission alleging fraud or deceptive practices also include the use of an auto dialer or recorded message. In these cases the consumer is concerned that the caller attempted to perpetrate a fraud or the company sold an unsatisfactory product. The Commission refers such complainants to the appropriate state or federal authorities charged with oversight of such matters, such as the Federal Trade Commission. The Commission also notes that the TCPA does not preempt state laws regulating telephone solicitation and that consumers may turn to other appropriate authorities where fraud or other commercial abuse is suspected. In light of these apparent differences between live and auto dialer solicitations, we seek comment on what distinctions we should make between these kinds of solicitations. The Commission also seeks comment on whether regulation of live solicitation may be necessary to protect\residential subscribers' privacy rights.

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[24] 47 U.S.C. § 227 (a)(3).

[25] *See In the Matter of Unsolicited Telephone Calls CC Docket 78-100*, 77 FCC 2d 1023 (1980).

[26] TCPA, Sec. 2.

[27] Congressional Record, November 26, 1991, H 11310.

[28] *Id.* at H 11311.

[29] In addition, the Report of the Senate Committee on Commerce, Science, and Transportation on the Senate Bill which preceded the TCPA expressly states that:

[30] Senate Report 102 178, to accompany Bill S. 1462, September 19, 1991.

2. Regulatory Alternatives Available to Restrict Telephone Solicitation.

27. *Methods Available to Address Telephone Solicitation.* The TCPA states that the Commission shall compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific "do not call" systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages.[31] The Commission has identified five potential mechanisms to restrict live operator telephone solicitation to subscribers: national or regional databases of persons who object to receiving solicitations, network technologies that enable called parties to avoid calls from certain numbers, company generated "do not call me" lists, special directory markings, and time of day restrictions. We will address each in turn; we seek comment on these alternatives as well as proposals for additional methodologies. Comments should include an analysis of the costs and benefits to be derived from particular alternatives and should describe the technologies involved. The Commission also seeks comment on whether different methods and procedures may apply for local telephone solicitations, and for groups such as small businesses, or holders of second class mail permits.

28. *Databases.* The TCPA states that the Commission may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase.[32] The TCPA prohibits charging residential telephone subscribers for being on such a database, and authorizes the FCC to investigate how such a database would operate and under what terms. It appears that the state of Florida has gained some experience in administering a state-wide do not call system. We understand that under the Florida system subscribers pay ten dollars annually to the state consumer protection agency to be included in a do not call list. Telemarketers operating in Florida must utilize the list to screen out calls to objecting residents. The list is updated quarterly, and telemarketers are charged approximately four hundred dollars quarterly for access to a floppy disc or two hundred and fifty dollars for a paper edition. Although many advocates of a national database cite to the Florida experience as evidence of the viability of a national database, we note significant differences that make it difficult to draw from the Florida experience on a national level. The TCPA expressly prohibits charging for participation in the database, and although Florida is charging ten dollars for participation, presumably the costs of establishing and maintaining a national database are far greater. We also note that given the overall regulatory framework of the TCPA, consumer response to a national database may not be satisfied by what such a database would be able to deliver. For example, if a database were updated quarterly or semi-annually, consumers signing up for the database might continue to be called for 3 to 6 months before actually being entered onto the system. In addition, even after the subscriber is on the database, consumers may continue to receive all calls exempted by the TCPA. For example, subscribers on the database would continue to receive calls from charitable institutions such as police benevolent associations, booster clubs, colleges and universities, state and local governments, election campaigns and pollsters. Commenters should also address the issue of the privacy concerns of consumers on a database list when such a list is maintained and accessible widely by private entities. Thus, the cost of such a database must be weighed against actual benefits to be derived. Commenters are asked to provide a rigorous analysis of costs and benefits of the national database alternative, including:

1. A complete description and analysis of the system being considered, including technology, equipment and software.

2. A description of the entity or entities interested in and available to establish and operate such a system.

3. Sources of capital investment for the system and analysis of cost recovery mechanisms for the investments under consideration.

4. Cost of access to the system, and method of access to the system (software or hard copy; by license, purchase or other alternative).

5. Frequency of updating the system, including an analysis of the responsible entity to update, the method to be utilized and the informational and educational requirements to the public.

29. Any analysis should reflect that the Commission tentatively finds that any database would not be a government sponsored institution and would not receive federal funds or a federal contract for its establishment, operation, or maintenance. In signing this legislation, the President noted that: "I also understand that the Act [TCPA] gives the Commission flexibility to adapt its rules to changing market conditions. I fully expect that the Commission will use these authorities to ensure that the requirements of the Act are met at the least possible cost to the economy."[33] In these times of fiscal restraint, the Commission does not believe that it is in the public interest to pass on to taxpayers the cost of a national database system.

30. *Network technologies.* Some entities have described network technologies that could be utilized to allow callers to screen out telephone solicitations. Presumably, under such a system all telemarketers would be assigned to the same telephone prefix. Subscribers would then be able to block calls from that prefix. It is not clear whether current network technologies could support such a system, especially on interstate calls that are preceded by an area code. Certainly, the called party would have to be served by a central office equipped with the capability to recognize and block the special prefix. In addition, telemarketers would have to be switched over into that prefix. Given that telemarketers can range from multi-billion dollar businesses to a myriad of smaller concerns across the country, it is not clear whether the telephone numbering plan could support such a prefix. The Commission seeks comment on this alternative, including a rigorous cost and

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[31] 47 U.S.C. § 227(c).
[32] 47 U.S.C. § 227(c)(3).
[33] TCPA Statement by the President, December 20, 1991.

benefit analysis. The Commission also seeks comment on any other network technologies or applications that could address the issue of screening out telemarketing calls.

31. *Special Directory Markings.* This type of regulatory approach would require carriers to collect information from subscribers regarding whether they wish not to receive telephone solicitations. Those subscribers who express a desire not to receive such calls can be identified by a special mark in their directory listing. Telemarketers would be required to screen their marketing lists against these directory markings. It is not clear how such a system would be applied to national telemarketers. The Commission requests comments on this alternative, again including rigorous cost and benefit analysis.

32. *Industry-based or Company Specific Do Not Call Lists.* This alternative is a type of self-policing mechanism on a company or industry-wide level. Some companies have been maintaining lists of customers or prospective customers who have expressed a desire not to be contacted. Usually the company has become aware of the subscriber's wishes through a prior telemarketing contact during which the subscriber asked not to be contacted in the future. Companies indicate a desire to avoid expending time and investment in contacting subscribers who do not wish to be contacted. The company might keep a record of the called party's wishes and not call that party for at least several years. To date, these records appear to have been maintained by companies in hard copy form by marking a local directory listing or other telemarketing list. Some companies have begun to develop database do not call lists in order to screen other marketing lists prior to use. The issue is whether to mandate maintaining such records on a federal level. Under such a regulatory framework, companies would be required to establish, operate and maintain do not call lists. If a complaint is received regarding the telemarketing practices of a company, the company would be required to produce evidence of compliance with this requirement. The Commission seeks comment on this alternative, including analysis of whether the system should be considered on a company specific or industry-wide basis. Comments should reflect the sometimes proprietary nature of a company's marketing list and any anticompetitive consequences that open access to such information could occasion. Commenters should also address the costs and benefits associated with the "do not call list" alternative.

33. *Time of Day Restrictions.* Some complaints regarding telemarketing practices have indicated consumer frustration at having been contacted at an inconvenient time of day. State and local governments have sometimes enacted time of day limits during which telemarketers may contact consumers. Local ordinances have sometimes implemented such a regulatory approach to door-todoor live solicitation. At the federal level, time of day restrictions have been incorporated into the Fair Debt Collection Act, 15 U.S.C. § 1602 *et seq.* . Creditors subject to that act may only contact debtors by telephone between the hours of 9 a.m. to 9:00 p.m. It appears that time of day restrictions place minimal constraints on telemarketers who indicate voluntary compliance with such time restrictions as a matter of good business etiquette. However, it is questionable whether such restrictions are effective or necessary in the telemarketing field. While creditors may sometimes wish to contact debtors who are difficult to locate by telephoning at odd hours, it appears that telephone solicitation calls take place during regular business hours or the early evening hours. Advertisers have no particular incentive to contact consumers at extremely odd hours; therefore, it is unlikely that time restrictions similar to the Fair Debt Collection Act would curb much solicitation. It could, however, eliminate those few instances of abuse. In analyzing this alternative, commenters should note that any time restrictions more restrictive than a 9:00 a.m. to 9:00 p.m. system would likely be overly burdensome on legitimate business activities, difficult to monitor and offer little, if any, additional benefits. The Commission seeks comment on this alternative. The Commission further seeks comment on existing state or local systems and on whether it is necessary to implement time restrictions on a federal level. The Commission requests commenters to analyze interstate and local calls separately, recognizing that the TCPA expressly does not preempt state laws in this area.

IV. CONCLUSION.

34. The Commission has attempted to balance the privacy concerns which the TCPA seeks to protect and the continued viability of beneficial and useful business services. The Commission has also given weight to the commercial speech rights of advertisers. In striking this balance, the Commission recognizes the need to achieve the goals of the TCPA at minimal costs to taxpayers and no cost to residential telephone subscribers. The Commission proposes implementing regulations that facilitate enforcement of the prohibitions of the TCPA against unsolicited advertising that may jeopardize health and safety and intrude on the privacy rights of telephone subscribers. The Commission also proposes to adopt exemptions to liability that protect the viability of beneficial services that were not intended to be curtailed by the goals of the TCPA. Keeping in mind this careful balancing of interests and costs, commenters are invited to present their views, including alternative proposals.

V. OTHER MATTERS.

35. This is a nonrestricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally,* 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206.

36. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA, on which written public comments are requested, is set forth in Appendix C. Those comments must be filed in accordance with the same filing deadlines as comments on the Notice of Proposed Rulemaking, but they must have a separate and distinct heading which designates them as responses to the Initial Regulatory Flexibility Analysis.

37. The Secretary shall send a copy of this Notice of Proposed Rulemaking, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. 5 U.S.C. § 601 *et seq.* (1981).

38. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before May 26, 1992 and reply comments on or before June 25, 1992. To file formally in this

proceeding, you must file an original and five copies of all comments, reply comments, and supporting documents. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, 1919 M St. N.W., Washington, D.C. 20554.

VI. ORDERING CLAUSES.

39. Accordingly, IT IS ORDERED THAT pursuant to Sections 1, 2, 3, 4, 201205, and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 153, 154,201-205, and 227; and 5 U.S.C. § 553, NOTICE OF PROPOSED RULEMAKING is hereby provided as indicated above.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

PUBLIC LAW 102-243

APPENDIX A

e Hundred Second Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Thursday, the third day of January, one thousand nine hundred and ninety-one

An Act

To amend the Communications Act of 1934 to prohibit certain practices involving the use of telephone equipment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Telephone Consumer Protection Act of 1991".

SEC. 2. FINDINGS.

The Congress finds that:

(1) The use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques.

(2) Over 30,000 businesses actively telemarket goods and services to business and residential customers.

(3) More than 300,000 solicitors call more than 18,000,000 Americans every day.

(4) Total United States sales generated through telemarketing amounted to $435,000,000,000 in 1990, a more than four-fold increase since 1984.

(5) Unrestricted telemarketing, however, can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety.

(6) Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.

(7) Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices.

(8) The Constitution does not prohibit restrictions on commercial telemarketing solicitations.

(9) Individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.

(10) Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.

(11) Technologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer.

(12) Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency

situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.

(13) While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.

(14) Businesses also have complained to the Congress and the Federal Communications Commission that automated or prerecorded telephone calls are a nuisance, are an invasion of privacy, and interfere with interstate commerce.

(15) The Federal Communications Commission should consider adopting reasonable restrictions on automated or prerecorded calls to businesses as well as to the home, consistent with the constitutional protections of free speech.

SEC. 3. RESTRICTIONS ON THE USE OF TELEPHONE EQUIPMENT.

(a) AMENDMENT.—Title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) is amended by adding at the end the following new section:

"SEC. 227. RESTRICTIONS ON THE USE OF TELEPHONE EQUIPMENT.

"(a) DEFINITIONS.—As used in this section—

"(1) The term 'automatic telephone dialing system' means equipment which has the capacity—

"(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

"(B) to dial such numbers.

"(2) ~~The~~ term 'telephone facsimile machine' means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

"(3) The term 'telephone solicitation' means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

"(4) The term 'unsolicited advertisement' means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.

"(b) RESTRICTIONS ON THE USE OF AUTOMATED TELEPHONE EQUIPMENT.—

"(1) PROHIBITIONS.—It shall be unlawful for any person within the United States—

"(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of

the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

"(i) to any emergency telephone line (including any '911' line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

"(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

"(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

"(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

"(C) to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine; or

"(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

"(2) REGULATIONS; EXEMPTIONS AND OTHER PROVISIONS.—The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission—

"(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent; and

"(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe—

"(i) calls that are not made for a commercial purpose; and

"(ii) such classes or categories of calls made for commercial purposes as the Commission determines—

"(I) will not adversely affect the privacy rights that this section is intended to protect; and

"(II) do not include the transmission of any unsolicited advertisement.

"(3) PRIVATE RIGHT OF ACTION.—A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

"(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

"(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

"(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

"(c) PROTECTION OF SUBSCRIBER PRIVACY RIGHTS.—

"(1) RULEMAKING PROCEEDING REQUIRED.—Within 120 days after the date of enactment of this section, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall—

"(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific 'do not call' systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

"(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

"(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

"(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

"(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

"(2) REGULATIONS.—Not later than 9 months after the date of enactment of this section, the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

"(3) USE OF DATABASE PERMITTED.—The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase. If the Commission determines to require such a database, such regulations shall—

"(A) specify a method by which the Commission will select an entity to administer such database;

"(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification,

in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;

"(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;

"(D) specify the methods by which such objections shall be collected and added to the database;

"(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

"(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

"(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

"(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

"(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with the regulations prescribed under this subsection;

"(J) be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

"(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

"(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

"(4) CONSIDERATIONS REQUIRED FOR USE OF DATABASE METHOD.—If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall—

"(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;

"(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and—

"(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of

subscribers who object to receiving telephone solicitations;

"(ii) reflect the relative costs of providing such lists on paper or electronic media; and

"(iii) not place an unreasonable financial burden on small businesses; and

"(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

"(5) PRIVATE RIGHT OF ACTION.—A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State—

"(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

"(B) an action to recover for actual monetary loss from such a violation, or to receive up to $500 in damages for each such violation, whichever is greater, or

"(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

"(6) RELATION TO SUBSECTION (B).—The provisions of this subsection shall not be construed to permit a communication prohibited by subsection (b).

"(d) TECHNICAL AND PROCEDURAL STANDARDS.—

"(1) PROHIBITION.—It shall be unlawful for any person within the United States—

"(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or

"(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

"(2) TELEPHONE FACSIMILE MACHINES.—The Commission shall revise the regulations setting technical and procedural stand-

ards for telephone facsimile machines to require that any such machine which is manufactured after one year after the date of enactment of this section clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

"(3) ARTIFICIAL OR PRERECORDED VOICE SYSTEMS.—The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that—

"(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

"(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

"(e) EFFECT ON STATE LAW.—

"(1) STATE LAW NOT PREEMPTED.—Except for the standards prescribed under subsection (d) and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits—

"(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

"(B) the use of automatic telephone dialing systems;

"(C) the use of artificial or prerecorded voice messages; or

"(D) the making of telephone solicitations.

"(2) STATE USE OF DATABASES.—If, pursuant to subsection (c)(3), the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national datebase that relates to such State.

"(f) ACTIONS BY STATES.—

"(1) AUTHORITY OF STATES.—Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive $500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to

an amount equal to not more than 3 times the amount available under the preceding sentence.

"(2) EXCLUSIVE JURISDICTION OF FEDERAL COURTS.—The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

"(3) RIGHTS OF COMMISSION.—The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

"(4) VENUE; SERVICE OF PROCESS.—Any civil action brought under this subsection in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the defendant is an inhabitant or where the defendant may be found.

"(5) INVESTIGATORY POWERS.—For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

"(6) EFFECT ON STATE COURT PROCEEDINGS.—Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

"(7) LIMITATION.—Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

"(8) DEFINITION.—As used in this subsection, the term 'attorney general' means the chief legal officer of a State.".

(b) CONFORMING AMENDMENT.—Section 2(b) of the Communications Act of 1934 (47 U.S.C. 152(b)) is amended by striking "Except as provided" and all that follows through "and subject to the provisions" and inserting "Except as provided in sections 223 through 227, inclusive, and subject to the provisions"

(c) DEADLINE FOR REGULATIONS; EFFECTIVE DATE.—

(1) REGULATIONS.—The Federal Communications Commission shall prescribe regulations to implement the amendments made by this section not later than 9 months after the date of enactment of this Act.

(2) EFFECTIVE DATE.—The requirements of section 228 of the Communications Act of 1934 (as added by this section), other than the authority to prescribe regulations, shall take effect one year after the date of enactment of this Act.

SEC. 4. AM RADIO SERVICE.

Section 331 of the Communications Act of 1934 is amended—

(1) in the heading of such section, by inserting "AND AM RADIO STATIONS" after "TELEVISION STATIONS";

(2) by inserting "(a) VERY HIGH FREQUENCY STATIONS.—" after "SEC. 331."; and

(3) by adding at the end the following new subsection:

"(b) AM RADIO STATIONS.—It shall be the policy of the Commission, in any case in which the licensee of an existing AM daytime-only station located in a community with a population of more than 100,000 persons that lacks a local full-time aural station licensed to that community and that is located within a Class I station primary service area notifies the Commission that such licensee seeks to provide full-time service, to ensure that such a licensee is able to place a principal community contour signal over its entire community of license 24 hours a day, if technically feasible. The Commission shall report to the appropriate committees of Congress within 30 days after the date of enactment of this Act on how it intends to meet this policy goal.".

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.

APPENDIX B

PROPOSED RULES

(Title 47 of the Code of Federal Regulations, parts 64 and 68, are proposed to be amended as follows:

1. The title of part 64 is revised to read as follows:

PART 64 -- MISCELLANEOUS RULES RELATING TO COMMON CARRIERS AND TELEMARKETERS

2. The table of contents for part 64 is amended by adding subpart K to read as follows:

Subpart K - Prerecorded or Artificial Messages

64.1100 Delivery restrictions.

3. The authority citation for subpart K is added to part 64 to read as follows:

Authority: 47 U.S.C. 151-154, 201, 205, 227, 403.

4. Subpart K is added to part 64 to read as follows:

Subpart K - Prerecorded or Artificial Messages

§ 64.1100 Delivery restrictions.

(a) No person may

(1) Initiate any telephone call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice,

(i) To any emergency telephone line, including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency;

(ii) To the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or any service for which the called party is charged for the call;

(2) Initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by § 64.1100(c);

(3) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine;

(4) Use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(b) For the purpose of § 64.1100(a), the term "emergency purposes" means calls made necessary in any situation affecting the health and safety of consumers.

(c) The term "telephone call" in § 64.1100(a)(2) shall not include a call or message by, or on behalf of, a caller:

(1) that is not made for a commercial purpose,

(2) that is made for a commercial purpose but does not include the transmission of any unsolicited advertisement,

(3) to any person with whom the caller has had a prior or current business relationship at the time the call is made, or

(4) by a tax exempt nonprofit organization.

(d) Automatic Dialing Devices; identification of the caller. All artificial or prerecorded telephone messages shall:

(1) At the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and

(2) During or after the message, state clearly the telephone number or address of such business, other entity, or individual.

5. The authority citation for subpart D of part 68 is revised to read as follows:

Authority: 47 U.S.C. 154, 155, 227, 303, 403.

6. Section 68.318(c) is amended by adding paragraphs (c)(3) and (c)(4) to read as follows:

§ 68.318 Additional limitations.

* * * * *

(c) * * *

(3) Line Seizure by Automatic Dialing Devices. Automatic dialing devices which deliver a recorded message to the called party must release the called party's telephone line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(4) Facsimile machines; identification of the sender of the message. It shall be unlawful for any person within the United States to use a computer or other electronic device to send any message via a telephone facsimile machine unless such message clearly contains, in a margin at the top or bottom of each transmitted page or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual. Facsimile machines manufactured on and after December 21, 1992 must clearly mark such identifying information on each transmitted message.

APPENDIX C

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reasons for Action:

This rulemaking proceeding is initiated to obtain comment on proposed rules and regulations to implement the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (TCPA).

Objectives:

The Commission seeks to implement the TCPA and define exemptions to liability under the TCPA.

Legal Basis:

The proposed action is authorized under Sections 1, 4, 201-205, and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, and 227.

Reporting, Recordkeeping and other Compliance Requirements:

This Notice of Proposed Rulemaking proposes rules to implement the TCPA and seeks comment on regulatory mechanisms to balance individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade in a way that protects the privacy of individuals and permits legitimate telemarketing practices.

Federal Rules which Overlap, Duplicate or Conflict with these Rules:

None.

Description, Potential Impact, and Number of Small Entities Involved:

Proposed rules in this proceeding could affect the telemarketing practices of numerous businesses, including small entities. After evaluating the comments and reply comments in this proceeding, the Commission will examine further the impact of any rule changes on small entities, and will set forth its finding in the final Regulatory Flexibility Analysis.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives:

The Notice of Proposed Rulemaking solicits comments on any significant alternatives minimizing the impact on small entities consistent with the stated objectives.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 92-97

In re	)	
	)	
Revision of	)	MM Docket No. 91-140
Radio Rules and Policies	)	

REPORT AND ORDER

Adopted: March 12, 1992; Released: April 10, 1992

By the Commission: Commissioner Quello issuing a statement; Commissioner Barrett dissenting in part and concurring in part and issuing a statement . Commissioner Duggan issuing a statement.

TABLE OF CONTENTS

		Paragraph
I.	INTRODUCTION	1
II.	BACKGROUND	4
III.	NATIONAL OWNERSHIP RULE	
	A. Background	14
	B. Comments	15
	C. Discussion	18
IV.	LOCAL OWNERSHIP RULE	
	A. Background	31
	B. Comments	32
	C. Discussion	34
V.	JOINT VENTURES	
	A. Background	58
	B. Comments	60
	C. Discussion	63
VI.	ANNUAL REPORTING AND INFORMATION GATHERING	68
VII.	CONCLUSION	69
VIII.	ADMINISTRATIVE MATTERS	70
IX.	ORDERING CLAUSES	74

Appendix A -- Regulatory Flexibility
Appendix B -- List of Commenters
Appendix C -- Rule Changes
Appendix D -- Analysis of Selected Markets

I. INTRODUCTION

1. This Report and Order resolves issues raised in the Notice of Proposed Rule Making in MM Docket 91-140, 6 FCC Rcd 3275 (1991) (Notice). The Notice proposed to relax the Commission's local and national radio ownership rules. The Notice also sought comment regarding whether to restrict joint ventures among stations, particularly time brokerage arrangements. A list of comments received in response to the Notice is attached as Appendix B.

2. In our 1984 proceeding relaxing the national ownership caps for radio and television, the Commission emphasized the explosion of media outlets since the advent of the ownership rules, the extremely fragmented structure of the broadcasting industry and the fact that viewpoint diversity is primarily a function of local, and not national, alternatives.[1] Similarly, in relaxing the radio duopoly rule in 1989, we again stressed the substantial increase in the number and variety of media outlets.[2] Since these two decisions, the marketplace trends identified therein have become even more pronounced. The number of radio stations has continued to grow, as has the number of non-radio outlets, such as cable, that compete with radio broadcasters for audience and advertising. In addition, as a direct result of this tremendous market fragmentation, many participants in the radio business are experiencing serious economic stress. More than half of all commercial radio stations lost money in 1990, and small stations in particular have been operating near the margin of viability for years.[3]

3. As discussed in detail below, we find that these changes in the radio marketplace warrant further revision of our radio ownership rules. Accordingly, we are today relaxing the national ownership cap and the local ownership rules, and are modifying our time brokerage policies. These

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[1] Report and Order in Gen. Docket No. 83-1009, 100 FCC 2d 17 (1984) (Ownership Report and Order). The Commission initially voted to phase out the national ownership caps. A relaxed national ownership cap for both radio and television was retained on reconsideration, primarily due to concerns specific to television station ownership. See Memorandum Opinion and Order in Gen. Docket No. 83-1009, 100 FCC 2d 74, 77 (1985) (Ownership Reconsideration Order) ("With one exception, the petitioners do not specifically question any of the determinations made with regard to the relaxation of the restrictions on multiple ownership of radio stations.").

[2] See First Report and Order in MM Docket No. 87-7, 4 FCC Rcd. 1723 (1989) (Contour Overlap Order).

[3] See Overview of the Radio Industry, Mass Media Bureau, January 1992, at 5 (Overview), which is included in the record of this Docket. This analysis of the radio industry is based on the following sources: FCC Annual Financial Reports; Robert J. Coen, McCann-Erickson, Inc.; NAB/BCFM Radio Financial Reports, 1984-1991; Duncan's Radio Market Guide; U.S. Bureau of Economic Analysis; U.S. Bureau of Labor Statistics.

actions reflect a balancing of competing concerns: on the one hand, the promotion of economic competition and program diversity by diversifying ownership and, on the other hand, the achievement of the demonstrable benefits resulting from group ownership, such as the promotion of program service diversity and the development of new broadcast services. Our action today supports our core objectives of economic competition and viewpoint diversity by recognizing that the existence of a vibrant marketplace is necessary to maximize those goals.

II. BACKGROUND

4. As observed in the Notice, the radio industry has become increasingly diverse and competitive over the past decade. Today, there are over 11,000 radio stations in the United States. The number of FM radio stations has grown dramatically -- from 4,374 in 1980 to 6,077 in 1991, an increase of 39 percent. The number of AM radio stations has also increased -- from 4,589 in 1980 to 4,985 in 1991.[4] As of mid-February 1992, an additional 274 AM and 1,350 FM stations were authorized but are not yet operational.[5] The radio industry of 1992 is thus extremely fragmented, with no single entity holding any measure of nationwide market power.[6]

5. At the same time, the number of non-radio outlets competing with radio for audiences and advertising revenues has also increased substantially. Popular music, a mainstay of radio programming, is now available through several cable networks, most notably MTV and VH-1 (available to 56.6 and 41.2 million households, respectively).[7] In addition, the number of 24-hour per day cable radio network entities has risen from approximately six in 1984 to 15 today, offering roughly 100 separate audio

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[4] Broadcasting Yearbook, 1982, at A-7; FCC News Release, January 3, 1992, Mimeo No. 21284.

[5] These figures represent stations for which construction permits have been granted but no license application has been filed. Of the 1,350 FM construction permits, 230 are for non-commercial stations.

[6] Department of Justice guidelines provide a means for evaluating industry concentration. When evaluating proposed mergers, the Department of Justice considers an industry unconcentrated if the post-merger level of concentration results in an Herfindahl-Hirschman Index (HHI), a standard measure of industry concentration, below 1000. (An industry or market of 10 equally-sized firms would have an HHI of 1000.) Based on revenue, the HHI for the commercial radio industry, on a nationwide basis, was 49 in 1990, having declined from 77 in 1980. We also note that an antitrust analysis is merely one factor that the Commission will weigh in evaluating the public interest in possible modification of the multiple ownership restrictions. See, e.g., para. 50, infra.

[7] Cable Television Developments, NCTA, Sept. 1991.

channels.[8] Of these network entities, three digital networks have recently emerged, each of which currently provides about 30 channels of CD quality music.[9] On the video front, the number of television stations has grown from a total of 1,019 in 1980 to a total of 1,494 today. Cable has also seen considerable growth, with national cable penetration increasing from 25 percent in 1980 to 64 percent today and the number of national basic cable programming networks growing from 34 to at least 80 during the same time period.[10]

6. In response to this intense inter- and intra-industry competition, radio station programming has become increasingly diverse and targeted. In the mid-1970s, for example, one follower of the radio industry classified stations according to eight major formats. Today, it tracks 35 major formats and more than 20 minor formats.[11] In addition, national radio services such as cable radio and digital audio broadcasting are poised to change the face of the radio industry by the turn of the century.

7. With this increased diversity has come a degree of market fragmentation that has dramatically changed financial conditions for the radio industry. Significantly, these changes are more than simply cyclical. Between 1980 and 1985, radio revenues grew, on average, 11 percent annually, which was more than twice as fast, in real terms, as the Gross National Product. Between 1985 and 1990, however, the growth rate of radio revenues dropped almost in half to, on average, six percent,[12] slower than the economy as a whole. Revenue growth per station dropped from 3.3 percent annually in 1980-85 to 0.2 percent in 1985-90 -- one tenth the annual growth rate of the Gross National Product for the same period.[13] This slowdown in revenue growth, combined with the increase in the number of stations over the past decade, resulted in per station revenue growth, on average, of approximately

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[8] Id. at 26c - 30c.

[9] These three services are Digital Music Express (DMX), which is available to one million cable homes on 40 systems; Digital Cable Radio (DCR), with a potential audience of one million subscribers on 25 cable systems; and Digital Planet, which is currently being tested on three systems. Cablevision, December 2, 1991, at 24. Digital cable radio networks eventually will be able to offer as many as 250 channels.

[10] FCC Office of Plans and Policy Working Paper No. 26, Broadcast Television in a Multichannel Marketplace, 6 FCC Rcd 3996, 4044, 4049 (1991) (OPP Paper); NBC Comments in response to Notice of Inquiry in MM Docket No. 91-221, 6 FCC Rcd 4961 (1991); Tentative Decision in BC Docket No. 82-345, 94 FCC 2d 1019, 1058 (1983).

[11] This information was provided by Katz Radio Group, an advertising representative firm.

[12] This is a compound annual average rate of growth.

[13] See Overview at Attachment 6.

three percent per year in real terms from 1980 through 1985. From 1985 through 1990, real per station revenue remained virtually unchanged.[14] Indeed, in the first three quarters of 1991 alone, reported radio industry revenues dropped by three percent.[15] In addition, while estimated industry operating profit grew from 1980 to 1990, operating profits on a per-station basis have plummeted since reaching their peak in 1988.[16] This decline, combined with rising programming, sales and general and administrative costs, has led to a sharp decrease in operating margins (operating profits as a percent of sales) over the past five years for the average radio station.[17]

8. Further, radio's share of the local advertising market was flat throughout the 1980s even as the respective shares of directly competitive media, most notably local cable, increased. Radio's share of the local advertising market remained at 12 percent from 1980 to 1990.[18] Television's share, however, increased from 12.5 percent to 14.1 percent during the same period.[19] The percentage increase in cable's share was even more significant, rising from 0.03 percent ($8 million) in 1980 to 0.7 percent in 1990 (almost $400 million).[20] This increase reflects the fact that local cable systems are increasingly aggressive in competing for local advertising dollars, and radio is often the direct target for that competition.[21] All of

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[14] Id.

[15] Broadcasting, November 4, 1991 at 51.

[16] Estimated overall industry operating profit (earnings before taxes and interest) grew at 2.3%, compounded annually, in real terms from 1980 to 1990. In current dollar terms, average AM operating profits have dropped 50% and average FM operating profits have dropped 36% since 1988. See Overview at 5.

[17] Average operating margins for FM stations fell from 12.4% in 1987 to 8.3% in 1990; full-time AMs declined from 10.1% to 8.1%, and daytime AMs dropped from 9.5% to virtual breakeven. Id.

[18] Robert J. Coen, McCann-Erickson, Inc.

[19] Id.

[20] Id.

[21] See, e.g., Communications Corporation Comments at 10 ("the explosive growth and development of cable has severely impacted radio and television broadcasters"). A survey conducted by the New York State Broadcasters Association, placed in the record through ex parte comments of Association President Joseph A. Reilly, indicated that Association members responding to the question "What or who was your biggest competitor five years ago?" identified print media (61 percent) and other radio stations (24 percent). When asked "Who is your biggest competitor today?" 40 percent said print media and 29 percent said cable television. When asked "Who do you think will be your biggest competitor in five years?" 39 percent said cable

these statistics combined reveal that the competitive forces affecting radio are well established, and the trends that have emerged since at least 1985 indicate that radio's economic base will continue to erode as fragmentation grows.

9. Moreover, the overall industry figures mask the fact that the outlook for small radio stations, which comprise the bulk of the radio industry, is particularly bleak. Industry revenue and profit are overwhelmingly concentrated in large radio stations. Of almost 10,000 commercial radio stations nationwide, the top 50 revenue producing stations, .5 percent of all stations, accounted for more than 11 percent of total radio revenue in 1990 and an estimated 50 percent of total industry profit.[22] At the same time, more than half of all stations, primarily those with less than $1 million in sales, lost money.[23]

10. Under these circumstances, we conclude that radio's ability to serve the public interest in the spirit of the Communications Act is substantially threatened. The industry's ability to function in the "public interest, convenience and necessity" is fundamentally premised on its economic viability. For example, Group W notes that many stations have had to cut back significantly on staff and programming investment as they struggle to conserve resources in today's highly competitive media environment.[24] Similarly, Crown Broadcasting, EBE Communications and KQWB assert that numerous radio stations have reduced their news budgets and are foregoing public affairs programming to cut costs.[25] Moreover, according to Commission records, almost 300 radio stations are currently silent; more than half of them ceased broadcasting in the last 12 months.[26] Stations cannot serve the public interest if they are not on the air.

11. We are further persuaded that these trends are unlikely to be reversed. The communications industry will undoubtedly become more diverse, competitive and complex as new technologies are developed. We accordingly believe that it is time to allow the radio industry to adapt to the information marketplace of the 1990s, free of artificial constraints that prevent valuable efficiencies from being realized. Relaxing our radio ownership restrictions will grant operators greater opportunity to combine administrative, sales, programming, promotion, production and other

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television and 26 percent said other radio (including DAB). See Letter of Joseph A. Reilly to Chairman, Federal Communications Commission (Feb. 5, 1992).

[22] See Overview at 5.

[23] Id.

[24] Group W Comments at 2.

[25] Crown Comments at 3; EBE Comments at 2; KQWB Comments at 1.

[26] See Overview at 5.

functions, as well as to share studio space and equipment. Not only will such efficiencies enable radio stations to improve their competitive standing; they may also play a significant part in improving the diversity of programming available to the public. Indeed, using NAB data we can estimate the possible magnitude of the savings and benefit to the public if greater consolidation were to take place. In 1990, the industry spent an estimated $1.7 billion on general and administrative expenses.[27] If 10 percent of these costs were eliminated via consolidation, the $170 million in savings would raise industry profit by 30 percent.[28] If local stations decided to invest half the savings in programming, this would immediately boost per station programming investment -- which has grown at only 1 percent yearly in real terms since 1987 -- by 5 percent, and the remaining savings would still raise industry profitability by 15 percent.[29]

12. Accordingly, we today adopt new ownership regulations for the radio industry that will permit greater consolidation without threatening competition or diversity at either the national or local level. Specifically, the rules adopted here relax the national ownership caps to allow a single licensee to own up to 30 AM stations and 30 FM stations nationwide. Further, we modify the local ownership rule to permit a single owner to own an increased number of stations within a local radio market, depending on market size. In all but the smallest markets, a 25 percent pre-acquisition cap on the combined audience share of all owned stations will also be applied. Simulcasting on commonly owned stations in the same service within a market will be limited to 25 percent of the broadcast schedule. In addition, if a station licensee programs more than 15 percent of the time of another station in its market, that station, and its market share, will be counted against the brokering station's permissible ownership levels in determining its compliance with our revised radio ownership rules.[30] We also will require that all time brokerage contracts be placed in the public inspection files of the stations involved, and that local time brokerage agreements be filed with the Commission within 30 days of execution.

13. To monitor the effects of these modified rules, the Commission's Mass Media Bureau is directed to prepare an annual report assessing the impact of the new rules on competition, diversity and minority ownership. As part of its report, the Bureau will specifically track the market shares of

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[27] Id. at 6.

[28] Id.

[29] Id.

[30] This is not intended to suggest that the programmer acquires any rights with respect to management or control of the station in question. To the contrary, our rules require the licensee to maintain control over station management and ultimate programming decisions, regardless of any time brokerage agreements that may exist. Our new rule will merely use time brokerage restrictions as a means of preventing circumvention of the ownership rules through local time brokerage arrangements.

local and national combinations. Annual evaluation of these data will enable the Commission to take appropriate action should any one entity threaten to dominate the national radio market or a particular local radio market. See Section VI, infra.

III. NATIONAL OWNERSHIP RULE

A. Background

14. The present national ownership rule permits an individual or entity to own up to 12 AM and 12 FM stations. A single owner may own up to 14 stations per service if at least two of the stations are minority-controlled. 47 C.F.R. § 73.3555(d). The Notice proposed a number of options for relaxing the national rule. Some of those options were numerically-based, for example increasing the 12-12 rule to some higher number. Other alternatives were based on the stations' combined national audience reach or the stations' combined local market shares. Still other options were based on market size in that they proposed to permit greater combination of stations in larger, more diverse markets. The Notice also questioned whether AM and FM radio should be treated as a single aural service and sought comment on how any relaxation of the national rule would affect minority ownership of radio stations.

B. Comments

15. The commenters overwhelmingly support relaxation of the national ownership rule, with most suggesting that the restriction be eliminated entirely.[31] Commenters agree with the Notice that increased group ownership provides broadcasters with economies of scale, thereby strengthening the radio industry.[32] Commenters further contend that the communications industry as a whole, as well as the national radio marketplace, are so competitive and diverse that it would be virtually impossible for a few groups to control the dissemination of information and ideas. If undue control arises, commenters assert, antitrust laws are an appropriate safeguard against monopolization of the national market.[33] Commenters also argue that diversity and competition are local, not national, concerns, so national ownership should not be limited.[34]

16. The few commenters opposed to relaxing the national ownership rule contend that the Commission has not collected data sufficient to evaluate the effect of the 1984 increase in the ownership limit.[35] They also assert that increasing the limit would be contrary to the Commission's past pronouncements that diversity and competition are to be preserved, and contrary to the First Amendment principles underlying the Commission's rulemaking authority.[36] These commenters are particularly concerned that relaxing the national limit will inhibit ownership by minorities and independent broadcasters by pricing them out of the radio market, and that

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[31] See, e.g., Blackburn & Co. Comments at 2; CBS Comments at 10-17; Communications Corporation Comments at 2, 9-13; du Treil, Lundin & Rackley Comments at 2; Fairmont Broadcasting Comments at 2-7; Freedom of Expression Foundation Comments at 2-7, Marsh Broadcasting Comments at 2-7; Universal Broadcasting Comments at 2-8; Willis Broadcasting Comments at 2-7; Fuller-Jeffrey Comments at 1-2; Goodrich Comments at 1; Infinity Comments at 5-12; James Ingstad Comments at 4-5; Robert E. Ingstad Comments at 4-5; KQWB Comments at 1; Murray Communications Comments at 1; NAB Comments at 3-4, 11; Salem Communications Comments at 3. In addition to these formal comments, the Commission received more than 100 ex parte comments during the first two months of 1992; the majority of those strongly advocated elimination.

[32] See, e.g., James Ingstad Comments at 4; NAB Comments at 15; Mid-West Family Stations Comments at 1-3.

[33] See, e.g., Fuller-Jeffrey Comments at 2; Infinity Comments at 15; NAB Comments at 11.

[34] See, e.g., FTC Reply at 20-23; Mid-West Family Stations Comments at 3-4; NAB Comments at 12-13.

[35] See, e.g., AWRT Comments at 4-5; NABOB Comments at 1-4; TRAC Comments at 5-11; UCC Comments at 2-5.

[36] See, e.g., John R. Byrne Comments at 1; UCC Comments at 12; United States Catholic Conference Comments at 3-5.

increased group ownership will lead to the demise of locally produced news and public affairs programming.[37] They note that the 14-station minority limit was established to encourage non-minority broadcasters to invest in minority-controlled stations, but state that it has been ineffective in achieving this goal.[38] These commenters thus request that the Commission further study the problem of minimal minority and female participation in broadcasting before increasing the ownership limit. Further, several commenters argue that if the overall limit is not abolished, the minority cap should be set higher than the overall limit, or minority owners should be permitted to own an unlimited number of radio stations.[39]

17. In terms of implementation, many commenters advocating relaxation of the national rule assert that the limit should remain numerically based, and offer a number of specific suggestions as to what numbers should be used.[40] Most commenters oppose use of an audience reach or market share approach, arguing that such a rule would be prohibitively complex to administer.[41] They contend that audience reach is difficult to calculate and that ratings continually fluctuate and are subject to dispute. Some commenters also contend that use of market share data would be a disincentive for stations to achieve high ratings because the rule would preclude extensive consolidation of high rated stations.[42] Most commenters also oppose a market rank analysis, arguing that such an approach would favor large markets to the detriment of smaller markets, where the financial strain

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[37] See, e.g., AWRT Comments at 6-7; TRAC Comments at 29-30.

[38] See, e.g., AHORA Comments at 3; NABOB Comments at 2; NAACP Reply at 3-4; TRAC Comments at 36.

[39] See, e.g., Ragan A. Henry Comments at 1-2; NAACP Comments at 6.

[40] See, e.g., CapCities/ABC Comments at 10-13 (would permit ownership of at least 30 stations overall); Bonneville International Corporation Comments at 5-6 (suggests that the limit first be increased from 12 to 18 stations per service and then to 24 stations per service after three years); Crawford Broadcasting Comments at 5-6 (advocates limit of 30 radio stations overall, no more than 12 of which may be FM); Degree Communications Comments at 1 (supports limit of 20 stations per service); Group W Comments at 5-7 (supports limit of 25 stations per service); Sillerman Companies Comments at 1 (supports limit of 25 stations per service); Robert T. Wertime Comments at 2-3 (advocates raising AM cap to 15 stations, 18 if they are minority-controlled, and lowering FM cap to 8 stations, 10 if they are minority-controlled, or establishing a maximum coverage area per owner, whichever is more restrictive).

[41] See, e.g., Bonneville Communications Corporation Comments at 6; Group W Comments at 7-8; NAB Comments at 7-8.

[42] See, e.g., CapCities/ABC Comments at 12; Group W Comments at 8.

on the radio industry is most apparent.[43] Nonetheless, some of these commenters are amenable to using market rank as a less intrusive alternative to retaining national ownership limits, arguing that very large and diverse markets could not possibly be monopolized.[44] In addition, most commenters assert that the Commission should treat AM and FM stations equally for purposes of the national rule, arguing that AM and FM stations in the same market face the same economic conditions and competitive challenges from other media.[45] On the other hand, a few commenters contend that because AM stations are in worse economic health than FM stations and are generally technically inferior, they should be regulated less strictly.[46]

C. Discussion

18. Based on our careful review of the record in this proceeding and our own analyses, we conclude that the national ownership caps should be relaxed to permit ownership of up to 30 AM stations and 30 FM stations nationwide. As detailed above, the increase in radio and other mass media outlets we observed when we last reviewed the national ownership limitations has continued unabated. The number of radio stations, especially FM stations, has grown dramatically, and there are currently over 11,000 radio facilities nationwide. At the same time, the industry has witnessed a significant increase in the number of competing audio services delivered by cable systems, including music video offerings such as MTV and VH-1 and cable radio network services providing numerous separate audio channels. In addition, non-radio sources competing with radio owners for audience and advertising revenues have also multiplied, with the number of television stations growing from 883 to 1,489 since 1985 and cable penetration increasing from 41 percent to 64 percent since 1984.[47]

19. In view of these competitive realities, the likelihood of a single firm or group of firms exercising dominance over the radio industry through ownership of multiple radio stations at the national level is extremely remote. Indeed, when judged by Department of Justice standards, the industry is highly unconcentrated, garnering only a 49 HHI[48] -- far below the 1,000 HHI that marks the boundary between concentrated and unconcentrated

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43 See, e.g., Bonneville Communications Corporation Comments at 6-7; Group W Comments at 8; James Ingstad Comments at 5.

44 See, e.g., CBS Comments at 17-20.

45 See, e.g., CapCities/ABC Comments at 8-9; Group W Comments at 6-7; Mid-West Family Stations Comments at 4-5.

46 See, e.g., Crawford Broadcasting Comments at 4-6; du Treil, Lundin & Rackley Comments at 2; Nationwide Comments at 5.

47 See OPP Paper, 6 FCC Rcd at 4011; FCC News Release, January 3, 1992, Mimeo No. 21284; Overview at 2.

48 See note 6, supra.

industries. When coupled with the proliferation of radio and non-radio outlets over the past eight years, these figures persuade us that the national ownership limits can safely be relaxed at this time without adversely affecting competition and diversity in the national marketplace of ideas.

20. In this regard, we stress our earlier conclusions that competition and diversity are relevant primarily at the local, not the national, level. As we noted in 1984, the basic factors that determine the broadcast advertising market (i.e., stations' ratings, degree of competition in the listening area and demographics) are all local, and radio stations rarely compete outside their markets.[49] The local nature of radio competition is further highlighted by the fact that in 1990, more than 75 percent of total radio advertising expenditures were made in the local spot market.[50] Similarly, with respect to viewpoint diversity, the immediate frame of reference for most consumers is the local area in which they live and work. In other words, listeners in San Francisco, St. Louis and Philadelphia each perceive program and viewpoint diversity in terms of the ideas available to them locally, regardless of what ideas are available in other broadcast markets. As we indicated in 1984, "[f]or an individual member of the audience, the richness of ideas to which he is exposed turns on how many diverse views are available within his local market."[51]

21. We are also persuaded that relaxation of the national caps may actually enhance viewpoint diversity. Evidence adduced in this and earlier proceedings indicates that greater consolidation could increase the variety of programming available to the public, including local news and public affairs programming. In the 1984 Ownership Report and Order, for example, the record evidence indicated that commonly owned stations, on average, offer more public service programming and, because they generally have higher ratings on local news programming, might well respond to viewer demand for news more effectively than stations not commonly owned. Contrary to the notion that group owners are more apt to present monolithic viewpoints, we received evidence that group-owned stations take editorial positions and engage in basic reporting and coverage decisions on an autonomous basis. We concluded that diversity of viewpoint in local news reporting and editorializing on local issues can exist alongside a group ownership structure and that "it is possible to have greater viewpoint diversity than there is ownership diversity."[52] The Commission found similar evidence and

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[49] Ownership Report and Order at 41.

[50] Robert J. Coen, McCann-Erickson, Inc. About five percent of radio advertising represents national network expenditures, and 20 percent represents national spot revenues.

[51] Ownership Report and Order at 37.

[52] Ownership Report and Order at 34.

reached similar conclusions in the 1989 proceedings regarding the one-to-a-market and duopoly rules.[53]

22. The record accumulated in this proceeding corroborates these findings. For example, Infinity Broadcasting, a large radio group owner, submits that each of its stations makes independent decisions with respect to news, public affairs and other programming.[54] Similarly, CBS asserts that editorial policy is always established by individual CBS stations.[55] In addition, a recent study by the Associated Press Broadcast News Service found that radio stations in larger markets have larger news staffs, run longer newscasts and believe news to be more important than stations in smaller markets.[56] These results were not compiled in terms of large versus small stations, or group owned versus independent stations. Nonetheless, the fact that large markets are characterized by higher average station revenues suggests that this higher investment in news is a function of the benefits of scale, and portends that relaxation of the national rule will provide the public with more news and informational programming. We note, moreover, our long-held conclusion that all stations are obligated under the public interest standard of the Communications Act to serve their community of license, including providing programming that deals with issues of local concern.

23. In view of the foregoing, we believe the time has come to relax our national ownership restrictions. In so doing, we note that our goal is not to introduce wholesale restructuring of the broadcasting industry before the ramifications of significant change can become apparent.[57] Rather, we intend to promote competition and diversity by modifying our ownership rules in a manner that directly addresses the long-term economic changes that are endemic to the radio industry. Thus, while a clear majority of commenters support elimination of the national rules, we instead choose the more measured approach of relaxing the caps from 12 AM and 12 FM to 30 AM and 30 FM, limiting a single owner to approximately one-half of one percent of the total number of licensed stations. Although this new limit is clearly more restrictive than the balance of parties would have preferred, it is consistent with a substantial body of comments in the record. For example, Group W and the Sillerman companies propose a 25 AM/25 FM limit, Bonneville

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[53] Contour Overlap Order, 4 FCC Rcd 1723 (1989); Second Report and Order in MM Docket No. 87-7, 4 FCC Rcd. 1748 (1989) (One-to-a-Market Order).

[54] Infinity Comments at 16-17.

[55] CBS Reply at 4.

[56] AP Broadcast News Service Study, September 1991.

[57] Ownership Report and Order at 55.

International Corporation proposes a 24 AM/24 FM limit and CapCities/ABC proposes a limit of at least 30 stations overall.[58]

24. Our selection of the 30/30 limit reflects our agreement with the vast majority of commenters who argue that we should treat AM and FM the same for purposes of our national ownership rules. The efficiencies to be gained from greater consolidation can only be maximized to improve the radio industry as a whole if the national limits are relaxed for both the AM and FM services. As several commenters observe, the AM and FM services both face economic challenges, and the Commission traditionally has treated them alike for purposes of the ownership rules. Moreover, to the extent the AM service presents unique problems, they are more appropriately addressed by efforts specifically focused on AM improvement.[59]

25. The 30-station limit is calculated to permit beneficial consolidation in the industry while minimizing the likelihood of undue concentration, even using the most pessimistic assumptions. It is important to note that the theoretical maximum level of concentration, or "worst case scenario," is not a particularly meaningful measure. Under the 12/12 limit, for example, ownership levels rose to less than ten percent of what was theoretically possible.[60] Even if the "worst case" were to occur under the new rules, however, and the top ten existing group owners each acquired the maximum of 60 stations in the top 18 revenue-generating markets, they would control 30 percent of industry revenue. Yet, in this extremely unlikely scenario, the radio industry would still be far less concentrated than the cable and newspaper businesses, where the top ten firms accounted for 55 percent and 45 percent of the national market, respectively, in 1990. In addition, in 1990 dollars, the average revenues of each of those top ten radio group owners would be approximately $265 million, which is consistent with the 1990 revenues that the three largest revenue-producing radio groups are already achieving.[61] Notably, revenues of $265 million represent less

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[58] Our selection of the 30 AM/30 FM limit is based on our careful review of the record, our own analyses of industry data and our long-standing experience regulating the radio industry. See, e.g., ALLTEL Corp. v. FCC, 838 F.2d 551, 559 (D.C. Cir. 1988); Storer Broadcasting Co. v. FCC, 240 F.2d 55, 56 (D.C. Cir. 1956).

[59] See, e.g., Report and Order in MM Docket No. 87-267, 6 FCC Rcd 6273 (1991) (AM Expanded Band Order).

[60] As noted previously, under the 12/12 limits, the theoretical minimum number of group owners would be 415, yet we estimate that today there are roughly 5,200 such owners nationwide. Thus, although there theoretically could be a minimum of 166 group owners under the new 30/30 limits, we fully expect that there will continue to be a vastly greater number of owners at the national level.

[61] See Overview at Attachment 2 ($232 million for CapCities/ABC, $217 million for CBS, $200 million for Westinghouse).

than three percent of radio's total revenue in 1990.[62] Thus, even under the theoretically maximum concentration of the largest groups in the top markets -- a scenario we find highly unlikely given the historic ownership patterns in the industry and our experience under the 12/12 rule -- the radio industry under a 30/30 rule would still be less concentrated at the national level than other competitive media, and revenues averaged across the 10 largest theoretical owners would be close to the revenues already achievable under the present regime.

26. We emphasize that minority ownership remains a central concern and an important goal of the Commission under the revised national rules. Although it has increased over the past decade,[63] minority ownership in the radio industry remains at a disturbingly low level. We are thus concerned by the arguments of minority broadcasters that substantial relaxation of the national ownership rule could nullify the numerical advantage currently afforded to minority-controlled stations, who are permitted to own up to 14, rather than 12, radio stations per service. We note, however, that the two largest radio groups numerically in the United States are minority-controlled, and that the immediate effect of the rule change will be to allow these groups to expand beyond the 14/14 cap.[64]

27. Other minority organizations commenting in this proceeding have observed that the present 14-station minority limit has not been effective in attracting investment from non-minority broadcast interests in minority-controlled stations.[65] We agree. In addition, our experience has been that

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[62] Id.

[63] For example, according to NABOB, the number of black-owned radio stations rose from 30 in 1976 to 182 in 1991 -- a 506 percent increase in a period when the number of commercial stations overall grew by 29 percent. (Since 1981, black-owned radio stations increased by 29 percent, from 141 to 182, while overall stations grew by 20 percent). NABOB Comments at 3-4. Comments filed jointly by NAACP/LULAC/NBMC stated that the number of minority-owned broadcast stations (including all minorities, and both radio and TV) rose from 60 in 1978 to 281 in 1991, an increase of 368 percent during a period when the number of TV and radio stations together grew by 27 percent. NAACP Comments at 3.

[64] The three largest group radio owners are: (1) Willis Broadcasting Corp., which has interests in 13 AM and 13 FM stations; (2) Ragan Henry, who has interests in 9 AM and 12 FM stations; and (3) Capital Cities/ABC, Inc., which has interests in 11 AM and 10 FM stations. CBS Broadcast Group has interests in 8 AM and 12 FM stations, but has at least temporarily acquired an interest in a 13th FM station. Willis is minority-controlled and Ragan Henry is a minority individual.

[65] See, e.g., AHORA Comments at 3; NABOB Comments at 2; NAACP Reply at 3-4; TRAC Comments at 36. We note that such investment has not occurred in radio, while it has occurred in television to the extent that Home Shopping Network, a non-minority licensee, has taken advantage of the higher limit or

other policies intended to spur minority entry into broadcasting have generally been more effective in advancing this important goal. For example, the tax certificate policy enables the seller of a radio or television station to defer the gain realized on a sale if it sells to a minority broadcaster. The distress sale policy permits a broadcast licensee whose license has been designated for revocation hearing to sell its station, prior to the commencement of a hearing, to a minority broadcaster at a price substantially below its fair market value.[66] In addition, minority ownership is favorably considered in comparative hearings.

28. We also believe that access to capital is the most critical limitation on minority participation in the industry, and we thus concurrently propose to address that problem directly. Our recent Capital Formation Notice[67] seeks comment on several issues concerning the availability of capital in the broadcasting industry to minority and non-minority concerns alike. That Notice also proposes to afford passive investor status to Small Business and Minority Enterprise Small Business Investment Companies (SBICs and MESBICs), thereby substantially raising the attribution benchmark applicable to their broadcast investments. In addition, as discussed below at Section VI, the Commission will conduct an annual review of ownership trends in the industry under the new rules with particular attention to their impact on minority ownership. We will not hesitate to revisit this issue if minority ownership is adversely affected by the revised ownership regime.

29. In sum, we conclude that the record supports a relaxation of the national radio ownership rules. The national radio marketplace, which is itself extremely competitive and diverse, is but one of the many mass media now vying for audience and advertising revenue. We believe the freedom to own more radio stations nationwide will offer radio broadcasters the opportunity to enjoy greater efficiencies that redound to the benefit of the public and affirmatively serve our competition and diversity goals. As noted previously, the savings associated with greater scale can be used to improve programming while also boosting industry profitability, which our rules now may artificially depress.

30. Indeed, it may be argued that the evidence supports the contention of most commenters that the national limit could be repealed entirely without threatening diversity and competition. In an abundance of caution, however, we choose instead to increase the national limit to 30 AM stations and 30 FM

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the single majority shareholder provision of the attribution rules to acquire interests in two minority-controlled television stations in addition to its 12 non-minority-controlled television stations. See NAACP Reply at 3.

[66] Ordinarily, a licensee is prohibited from selling, assigning or otherwise disposing of its interest until the issues have been resolved in the licensee's favor.

[67] See Notice of Proposed Rule Making and Notice of Inquiry in MM Docket No. 92-51, FCC 92-96 (released Apr. 1, 1992) (Capital Formation Notice).

stations. Moreover, we stress that we will remain vigilant toward the possibility, however unlikely, that future developments may threaten our diversity and competition goals. We thus stand ready to re-evaluate the national caps adopted today if the Mass Media Bureau's annual report or other data reveal that such a review is warranted.

IV. LOCAL OWNERSHIP RULE

A. Background

31. The local radio ownership rule, or contour overlap rule, prohibits an individual or entity from owning two AM stations with overlapping 5 mV/m contours, or two FM stations with overlapping 3.16 mV/m contours. 47 C.F.R. § 73.3555(a). In addition, Commission rules require that the 5 mV/m contour of an AM station and the 3.16 mV/m contour of an FM station encompass the entire principal community to be served. 47 C.F.R. §§ 73.24(j), 73.315(a). Taken together, these rules prohibit ownership of two AM or two FM stations licensed to the same principal city, although AM/FM combinations within the same city are permitted. The Notice proposed to permit ownership of any number of stations in an area if their combined local market audience shares are at or below a given percentage. The Notice alternatively proposed to implement the above proposal in conjunction with a numerical cap, and questioned whether same-service, commonly owned stations in the same community should be permitted to simultaneously broadcast the same programming.

B. Comments

32. Commenters are generally amenable to retaining some level of regulation of local ownership, and note that the local market is more important than the national market for purposes of diversity and competition.[68] Many commenters suggest that the local limit should be established at two AM and two FM stations per market, with combinations resulting in more than two AMs and two FMs evaluated on a case-by-case basis.[69] They argue that there is no reason to allow AM/FM combinations but not AM/AM or FM/FM combinations. Other commenters propose that the local rule be eliminated, arguing that most markets are unconcentrated and that competition from other media is constantly increasing.[70] In addition, commenters tend to agree with the Notice that greater combination will not harm diversity because, while competing stations might try to reach the same

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[68] See, e.g., CBS Comments at 6.

[69] See, e.g., Bonneville International Corporation Comments at 7; CBS Comments at 27; FTC Reply at 15-16; Group W Comments at 9; see also Testimony of Richard Ferguson, Representing the Radio Operators Caucus, before Senate Communications Subcommittee, March 11, 1992.

[70] See, e.g., Ragan A. Henry Comments at 2; James Ingstad Comments at 6; Robert E. Ingstad Comments at 6; Sillerman Companies Comments at 4-5; 3-D Communications Corporation Comments at 5.

core audience, a single owner might try to program different stations to appeal to different audience segments in order to maximize its total audience size.[71] Most commenters also agree that group ownership leads to significant efficiencies, such as use of common studio equipment facilities, and some suggest that the prevalence of AM/FM combinations indicates that group ownership is efficient.[72] On the other hand, some commenters contend, as they did regarding the national ownership rule, that the Commission has not been presented with sufficient data to justify relaxing the local rule.[73] They assert that permitting more local market combinations will undermine competition and viewpoint diversity by pricing independent broadcasters out of the industry.[74]

33. Most commenters support use of a numerical formula as opposed to audience ratings based data for calculating local ownership. Commenters assert, as they did regarding the national rule, that a ratings based approach would discourage group owners from achieving high ratings (i.e., lower ratings would leave an owner room to purchase additional stations), and that ratings data are unreliable.[75] If a ratings based approach is used, however, most commenters addressing the issue agree with the Notice that divestiture should not be compelled if stations' ratings rise.[76] On the other hand, some commenters offer specific suggestions for basing local ownership caps on ratings information.[77] In addition, several commenters support a market rank approach, arguing that larger markets are so diverse and competitive that it would be impossible for one owner to inappropriately dominate such a market.[78] They assert that a market rank approach is

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[71] See, e.g., CBS Comments at 21; FTC Reply at 17-18; Group W Comments at 11-12.

[72] See, e.g., FTC Reply at 9.

[73] See, e.g., TRAC Comments at 5-8; UCC Comments at 13-15.

[74] See, e.g., HVS Partners Comments at 11.

[75] See, e.g., Bonneville International Corporation Comments at 7-10; CapCities/ABC Comments at 13-19; Communications Corporation Comments at 15; Fuller-Jeffrey Comments at 2; Mid-West Family Stations Comments at 6-7; NAB Comments at 1-10; Sheboygan Comments at 2-4; Sillerman Companies Comments at 4.

[76] See, e.g., EBE Communications Comments at 5-6; Ragan A. Henry Comments at 2-3; Salem Communications Comments at 3-4.

[77] See, e.g., American Media Comments at 2-3 (30 percent of audience); EBE Communications Comments at 5-6 (15 percent of audience); Ragan A. Henry Comments at 2-3 (25 percent of audience).

[78] See, e.g., Blackburn & Company Comments at 2; CapCities/ABC Comments at 15-16; CBS Comments at 27-29 (supports rank approach for ownership of more than two stations in a market); Crawford Broadcasting Comments at 2-4; Degree

superior to use of ratings because market rank information is easily verifiable. Commenters opposing use of market rank data, however, assert that such an approach would prejudice small markets.[79] Again, like their arguments concerning the national rule, most commenters assert that AM and FM should be treated alike for purposes of the local rule.[80] Most of the few commenters that address the issue also support unrestricted simulcasting.[81]

C. Discussion

34. When the Commission first applied local ownership restrictions to the radio service in 1938,[82] it stressed that those limits were intended to promote competition in both the economic marketplace and the marketplace of ideas. As discussed previously, we remain committed to protecting these bedrock concerns of competition and diversity. We also believe that, although radio is but one of many sources of entertainment and information available in any given market, some ownership restriction continues to be appropriate at the local level.

35. The record in this proceeding persuades us, however, that our commitment to competition and diversity is not threatened by moderate relaxation of the local ownership rules in a manner consistent with promoting the strong public interest in a viable radio industry. The radio marketplace of the first half of the twentieth century was far more concentrated than today, with listeners enjoying few options in many areas of the country and no options at all in others. Alternative media outlets, such as television and cable, were just barely on the technological horizon. The explosion of radio and other media since that time has provided local consumers with a wide range of media choices and presented radio owners with multiple competitive challenges.[83] Indeed, the average listener now has access to a plethora of radio voices in the local market -- the top 25 television markets have, on average, at least 50 commercial radio stations; markets 76 to 100 have, on average, at least 23 commercial radio stations; and even markets 176

Communications Comments at 1; Group W Comments at 9-13.

[79] See, e.g., Bonneville International Corporation Comments at 7-10.

[80] See, e.g., CBS Comments at 2-3; Demaree Media Comments at 1; EBE Communications Comments at 3-4; Fisher Broadcasting Comments at 5; Group W Comments at 6-7; James Ingstad Comments at 5-6; Robert E. Ingstad Comments at 5-6; Mid-West Family Stations Comments at 4-5; Salem Communications Comments at 2; 3-D Communications Comments at 4.

[81] See, e.g., Communications Corporation Comments at 16-17; Crawford Broadcasting Comments at 4; EBE Communications Comments at 7; contra AHORA Comments at 6-7; Panhandle Comments at 5.

[82] Genesee Radio Corp., 5 FCC 183 (1938).

[83] See paras. 5-6, supra.

to 200 have, on average, at least 9 commercial radio stations.[84] When coupled with the numerous other media outlets now available to local listeners, these figures make clear that the local marketplace is far more competitive and diverse -- indeed, has been virtually transformed -- since the local ownership rules were first promulgated.

36. In 1989, when relaxing the contour overlap rule, we recognized the need to adapt our rules to the changing marketplace and described many of the market developments noted herein. Although it was beyond the scope of that proceeding, many commenters urged us to completely eliminate the AM and FM duopoly rules.[85] In this proceeding, the Notice proposed substantial modifications to those rules in view of the increasing competition in the media marketplace and the continuing decline of the radio service over the past few years. We believe that these developments support further relaxation of the local ownership rules.

37. Indeed, the record evidence convinces us that our existing rules may actually hamper competition and diversity by making it unnecessarily difficult for stations to compete in today's thriving marketplace. By artificially denying stations efficiencies that could be realized through consolidation of facilities, managerial and clerical staffs, sales, bookkeeping, promotion, production, news and other aspects of station operation, the local ownership restrictions increase the costs of doing business at a time when cost-savings may well be critical to survival. The record suggests that, without the ability to realize efficiencies through consolidation, stations have turned to other measures to remain competitive. Commenters note that in many cases, cost reduction strategies have led to decreased news and programming expenditures.[86] Commenters also point out that, due to systemic economic pressures in the industry, many stations have turned to joint venture arrangements, such as time brokerage, to curb costs.[87]

38. The record further indicates that industry profits and programming investments would increase if radio stations were able to enjoy the efficiencies stemming from relaxed local ownership rules. As discussed previously, even if consolidation resulted in only a 10 percent reduction in

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[84] See Overview at 9.

[85] See 4 FCC Rcd at 1729.

[86] See, e.g., Crown Broadcasting Comments at 2-3; EBE Communications Comments at 2; Group W Comments at 2; KQWB Comments at 1.

[87] See, e.g., Blackburn & Company Comments at 2-3; CapCities/ABC Comments at 19; Crown Broadcasting Comments at 5; Degree Communications Comments at 2; Great American Comments at 4; HVS Partners Comments at 2-4; Gary Burns Comments at 2-3; KQWB Comments at 1-2; South Fork Comments at 11-16.

costs, significant savings could be realized.[88] The potential of achieving a 10 percent cost reduction, moreover, is confirmed by our own experience with the one-to-a-market rule, which generally prevents a single owner from acquiring a radio station and a television station in the same locality.[89] In recent cases for waivers of that rule, applicants have demonstrated that joint operation of television and radio stations whose contours overlap can result in cost savings of 10 percent or more, regardless of market size. For example, in P-N-P Broadcasting, Inc., 4 FCC Rcd 5596 (1989), involving a small market broadcaster, the savings attributed to joint operation represented better than 12 percent of the total costs of running the commonly-owned television station. Similarly, in Tulsa 23, 5 FCC Rcd 727 (1990), involving a medium-market operation, the applicants stated that joint ownership would reduce the operating costs of the stations by approximately 10 percent. In addition, in Great American Television and Radio Co., Inc., 4 FCC Rcd 6347 (1989), involving the 28th and 29th TV ADI markets, the applicants documented cost savings between 11 and 17 percent as a result of joint operation of two radio stations.[90] We believe it entirely reasonable to expect that the potential efficiencies available to radio-radio combinations will be at least as great, relative to total station costs, as those available to these radio-TV combinations.[91]

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[88] See para. 11, supra.

[89] 47 C.F.R. § 73.3555(b). Second Report and Order in MM Docket No. 87-7, 4 FCC Rcd. 1741 (1989), provides that the Commission will look favorably on requests for waiver of the one-to-a-market rule if the stations are in the top 25 television markets and include 30 other separately controlled broadcast stations.

[90] These savings resulted from sharing facilities or services such as: (1) tower and transmitter building; (2) studios and offices; (3) business departments and managers; (4) administrative and management services; (5) accounting and legal services; and, (6) engineering backup staffs.

[91] FTC specifically asserts that common ownership of radio stations leads to greater efficiencies, including cost savings in administration and overhead, promotion, equipment and programming. In this regard, it submits a study that concludes that the average price paid for an existing combination of radio stations in the same market would exceed by about 20 percent the price that would be paid for the same stations if those stations were operated on a stand-alone basis. See FTC Reply at 9-15, Appendix at 26 (Anderson and Woodbury, "Efficiencies from Common Ownership of Local Broadcast Media: The Case of AM and FM Radio Stations," February 1991). FTC points out that the study is limited to AM/FM combinations within a market, but asserts that it is reasonable to expect that same-service combinations could yield similar efficiencies. FTC also indicates that a case-by-case analysis of market conditions at the time the Commission reviews a new application or an application for transfer or assignment should be adequate to prevent the creation of undue market power.

39. Significantly, cost savings stemming from joint operation are likely to be invested in capital improvements and better programming that will inure to the benefit of the listening public. Commenters confirm that stations will spend more money on programming if greater station consolidation were permitted. CBS, for example, notes that in a variety of past proceedings, the Commission has recognized that multiple station ownership can result in operating efficiencies that translate into improved service.[92] Group W asserts that group ownership is likely to result in more diverse programming in the marketplace and increased service to specific audience groups.[93] Nationwide opines that "[o]nly healthy stations have the means and will to promote the public interest in a meaningful way."[94]

40. In view of the increasingly fragmented nature of the local radio marketplace, the economic strain experienced by many of today's radio broadcasters, and the sizeable savings that can stem from joint operation of same-market radio facilities, we conclude that our local radio ownership rules should be relaxed in order to help radio licensees better compete in the mass media marketplace. In crafting new local rules, the record established that there are three factors that may be considered relevant: (1) market size; (2) the number of commonly owned stations in the market; and (3) the audience share resulting from a proposed acquisition. For the reasons detailed below, we are adopting rules which take into account each of these factors, as follows:

> In markets with fewer than 15 radio stations, a single licensee will be permitted to own up to three stations, no more than two of which are in the same service, provided that the owned stations represent less than 50 percent of the stations in the market. Common ownership of one AM/FM combination will continue to be allowed in any event.
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> In markets with 15 to 29 radio stations, a single licensee will be permitted to own up to two AM stations and two FM stations, provided that the combined audience share of the stations does not exceed 25 percent.
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> In markets with 30 to 39 radio stations, a single licensee will be permitted to own up to three AM stations and two FM stations, provided that the combined audience share of the stations does not exceed 25 percent.
>
> In markets with 40 or more radio stations, a single licensee will be permitted to own up to three AM stations and three FM stations, provided that the combined audience share of the stations does not exceed 25 percent.

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[92] CBS Comments at 4 & n.5. CBS cites the One-to-a-Market Order, the Contour Overlap Order, and the Ownership Report and Order.

[93] Group W Comments at 12.

[94] Nationwide Comments at 4.

41. The Numerical Caps. The heart of our new rule is the numerical cap on station ownership in local markets. This numerical cap will enable radio broadcasters to jointly own several stations in a market and enjoy the efficiencies flowing from such common ownership. At the same time, the cap will preclude a single owner or group of owners from threatening to dominate the radio market through the acquisition of a large percentage of stations in any given location. As the record establishes, competitive realities are substantially different in markets of different sizes. Therefore, we have adopted a numerical cap which varies based on the number of radio stations competing in the market.

42. We stress that our selected caps reflect a measured approach to local radio ownership. As with our one-to-a-market waiver standard, we believe it prudent to craft an ample safety net to preserve our core diversity and competition concerns. For example, we believe that our decision to allow licensees in markets with 14 or fewer stations to acquire one more station than they may currently own[95] represents an extremely modest relaxation of our existing rules and properly balances our interests in this area. Furthermore, a tiered approach, whereby acquisition of a lesser number of stations is allowed as the number of stations in the market decreases, is consistent with policies by which we have given closer scrutiny to broadcast combinations in markets with fewer media outlets out of a concern that diversity and economic competition could be more easily undermined in such markets.[96] After balancing considerations of market size with our core concerns of diversity and competition, we believe the particular market size "tiers" we have chosen represent a reasonable accommodation of the competing concerns. We note that, as a practical matter, approximately 83 percent of the top 260 markets will be governed by either the 2 AM/2FM rule (57 percent) advocated by the majority of commenters, or by the more restrictive three-station rule (26 percent) applicable in smaller markets. Our 3 AM/3FM limit will apply in only approximately 4 percent of the top 260 markets, and our 3 AM/2 FM rule in approximately 13 percent of the top 260 markets.[97]

43. We further note that even if, in the wake of our decision, the industry were to consolidate up to the new limits (a highly unlikely possibility), the numerical caps would provide a powerful safeguard against concentration that would threaten our core concerns. A market-by-market analysis of the maximum potential consolidation that could occur in the top 260 Arbitron markets under the new numerical caps indicates that in 96.2 percent of markets there would be at least four separate owners; in 84.2 percent there would be at least five separate owners; and in nearly two-

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95 In recognition of our interest in permitting greater consolidation where necessary to promote a viable, competitive marketplace, we have long allowed one licensee to own an AM and an FM station in the same market.

96 See, e.g., One-to-a-Market Order, 4 FCC Rcd at 1752-53.

97 See James Duncan, American Radio, Spring 1991; American Radio Small Market Report 1991.

thirds of all markets (65.8 percent) there would be at least six such owners. In 26.2 percent of rated radio markets (which include nearly 60 percent of the audience in rated markets), there would be at least nine separate owners.[98] These projections do not include consideration of audience share caps, which will act as a further limit on consolidation.

44. The numerical limits also provide a significant safeguard against the possibility that one licensee could acquire a substantial market share, as measured by audience rating data, in any particular local market. In this regard, because stations in the FM service may in particular markets have an advantage over stations in the AM service, or vice versa, we have adopted separate limits for each. This approach will tend to prevent one entity from putting together a powerful combination of stations in a single service that may enjoy an advantage over stations in a different service. We believe that this is particularly important with respect to the FM service, which in many markets enjoys significant competitive advantages.[99]

45. Just as the particular market tiers chosen are designed to provide an ample safety net, we also intend to take a conservative approach in applying the new numerical caps. The relevant radio market for purposes of the local ownership rule will be the designated radio metro market recognized by Arbitron for stations assigned to such markets. In order to determine in which market "tier" a station falls, the Commission will calculate the number of stations in the market based only on stations rated in the market.[100] Thus, both non-commercial stations and stations with extremely small audience shares will generally be excluded from the station total, even though these stations are often significant factors in maintaining both competition and viewpoint diversity in particular markets.

46. For stations located outside designated market areas, the appropriate "competitive market" will be defined in terms of principal community contours. Specifically, we will define the radio market for commercial stations not assigned to designated markets as that area encompassed by the principal community contours (i.e., predicted or measured 5 mV/m for AM stations and predicted 3.16 mV/m for FM stations) of the overlapping stations proposing to have common ownership. The number of stations in the market will be determined based on the principal community contours of all commercial stations whose principal community contours overlap or intersect the principal community contours of the commonly-owned

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[98] Id.

[99] Indeed, on a nationwide basis, the AM service garners only 23 percent of today's radio audience. See Overview at 2.

[100] Arbitron's minimum reporting standard provides that to be reported, a station (1) must have received five or more minutes of listening in a quarter-hour in at least ten in-tab Metro diaries; (2) must have a Metro Cume rating of 0.5 or greater; and (3) must have a Metro Average Quarter-Hour rating of 0.05 or greater. See, e.g., Arbitron, Radio Market Report, Washington, D.C., Fall 1991, at iii.

stations. For example, if Station A and Station B have overlapping principal community contours and Station A proposes to acquire Station B, the number of stations in the market includes not only Stations A and B, but also all commercial stations whose principal community contours overlap with those of Station A or Station B.[101] Because this standard is based upon the existence of overlapping principal community contours, it is likely to be conservative in counting the number of stations receivable by listeners. Particularly in rural areas where there are relatively few operating stations, and thus relatively low levels of daytime interference, listeners may be able to receive AM signals beyond the predicted 5 mV/m contour and to receive FM signals beyond the predicted 3.16 mV/m contour. Hence, there are likely to be more signals available to the average listener in such a "market" than the number of signals that would be counted by this methodology. The level of competition is therefore likely to be higher than the overlap numbers might suggest.

47. Where a party seeks to acquire stations with overlapping principal community contours but which are licensed to communities in different markets, or where one is licensed to a community in a designated market and the other is not, we intend to apply the rules applicable in the market where the overlap takes place. If the overlap takes place in both markets, or both within a designated market and outside any designated market, the more restrictive limits applicable to the smaller market will be applied.[102]

48. The Audience Share Cap. In addition to implementing numerical caps for local radio markets, we believe that an additional safeguard in the form of a pre-acquisition 25 percent audience share cap should be adopted.[103] Such a cap will ensure that one entity is not able to purchase a combination of stations that complies with our numerical limits but that nonetheless

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101 A party seeking to purchase a station or stations outside of a designated market but in a market with 15 or more stations must commission an audience survey to demonstrate compliance with the 25 percent audience share cap described in more detail below.

102 To assist us in obtaining and reviewing compliance with these new rules, we will require that every transfer, assignment, or new station application involving principal community contour overlaps between commonly owned radio stations or time brokered stations (of the type governed by new §73.3555(a)(2)), contain a certificate affirming compliance with the applicable ownership rules substantiated by a separate exhibit containing the market and audience information necessary to demonstrate compliance. The applicable forms (FCC Forms 301, 314 and 315) will be amended accordingly. In the interim, each applicant should prepare its own separate exhibit and certification.

103 A station's "audience share" is the average number of persons age 12 or older on an average quarter-hour basis, Monday through Sunday, 6 a.m. to midnight, who listen to the station, expressed as a percentage of the average number of persons listening to rated commercial AM and FM stations in its radio market.

represents a disproportionate share of the local market that could threaten our competition and diversity concerns. For example, in some markets, it may be possible for a single entity acquiring the permissible number of stations to obtain a combined audience share well in excess of 40 percent of the total commercial radio audience. Although we believe the likelihood of such acquisitions is relatively small, such a possibility persuades us to couple our new numerical caps with a pre-acquisition audience share limit. Under this element of the new local ownership rule, a licensee will be precluded from acquiring a particular station if the combined audience share of all radio stations in the market to be owned by the licensee exceeds 25 percent at the time of its application.[104]

49. The 25 percent audience share limit is purposefully conservative. We recognize, for example, that radio stations face considerable competition for audience and advertising not just from each other, but also from a variety of other local media outlets. Indeed, recent statistics suggest that, on average, all radio stations combined represent only about 12 percent of any given local mass media advertising market.[105] We have nonetheless elected, out of an abundance of caution, to rely on an audience share cap that measures each owner's share of the radio marketplace alone.

50. The 25 percent audience share limit is also substantially more restrictive than ordinary antitrust concerns would mandate. A strict antitrust analysis might permit considerably greater consolidation in local markets than the 25 percent cap. However, our ownership rules are also designed to protect and promote a diversity of voices -- a concern distinct from antitrust objectives. Accordingly, we decline to base our common ownership restrictions solely on economic concentration considerations.

51. Specifically, we believe that a 25 percent audience share limit strikes the appropriate balance between our interest in permitting scale economies that should improve the quality of radio offerings, on the one hand, and our concerns over preventing undue concentration of control, on the other. Allowing up to 25 percent ownership in a media segment that represents 12 percent, on average, of an overall media advertising market means that, at most, a single radio owner could "control" about three percent of the local advertising marketplace. Moreover, focusing on the local radio market alone, the 25 percent audience share cap will assure that at least four diverse radio voices will co-exist alongside the numerous other media voices now routinely present. We are convinced, therefore, that both competition and viewpoint diversity will continue to flourish under the 25 percent audience share cap.

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[104] If the event triggering a market share analysis is not a station acquisition, but execution of a qualified local time brokerage agreement (see paras. 58 through 67, infra), the market shares of the stations involved shall be determined based on the most recent data available as of the date the local time brokerage agreement becomes effective.

[105] Robert J. Coen, McCann-Erickson, Inc.

52. We also stress that, in most cases, the numerical limits described above will ensure that there are more than four radio owners in any given market. Indeed, we anticipate that the numerical caps will often prevent a licensee from buying additional stations well before it reaches the 25 percent audience share cap. A staff analysis of the number of typical radio stations (i.e., those with average shares) a licensee could acquire without exceeding the 25 percent audience share cap illustrates this finding. For example, as shown by this analysis, an entity buying average radio facilities in a market with 40 stations would be able to acquire 10 stations and still meet the 25 percent audience share limit; however, the new numerical caps would prevent it from owning more than 6 total (3 AMs and 3 FMs). Moreover, even in small markets (i.e., those with fewer than 20 stations), a licensee buying average stations would not exceed the 25 percent audience share cap if it purchased the full complement of stations allowed under the new rules. See Appendix D.

53. Although many acquisitions will thus be unaffected by the audience share limit, we emphasize that the limit will nonetheless serve an important role in our new local ownership scheme -- namely, to prevent the consolidation of the top stations in a particular radio market. A staff analysis of 30 representative markets indicates that, even using a share base which includes non-commercial and unrated stations, in only one market would a single entity complying with the numerical limits be allowed to acquire the top-rated stations in the market. See Appendix D. Adjusting for the smaller share base of commercial rated stations which we are using in our rules, consolidation of the top-rated stations in this market would also be prohibited. Our studies thus indicate that the 25 percent audience share cap will act as an effective "backstop" to prevent undue concentration in local radio markets. At the same time, the cap will allow new combinations of low-rated stations that will be better able to compete with their top-rated competitors.

54. In response to commenters that consider an approach based on share prohibitively complicated, we believe that reliance on share data for purposes of the new local rule is relatively simple. Although a number of commenters voiced concerns that share data can be somewhat volatile, we believe the cautious approach we have taken in both crafting and applying the revised rule provides adequate safeguards to foreclose allowing undesirable combinations based on short term fluctuations in share data.[106] Accordingly,

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[106] In relying on audience survey data we intend to use the same type of data that is regularly used by participants in the radio industry for commercial purposes and on which significant investments, for advertising sales and other purposes, are routinely based. We are aware that the data involved are subject to certain sampling errors, and to rounding, and can fluctuate based on changes in audience tastes, station facilities and other market variables. Because the share limit is intended as a secondary protection to be used in association with the numerical limits and in view of our belief that minor variations in the data involve no systematic bias, we believe the data sources regularly used in the radio industry provide a valid basis on which we may act. For this reason and in the absence of information

when an entity owning stations in a market applies for an additional station in that market, the relevant share data for the market will be determined with reference to the most recent audience data for the market at the time its application is filed.[107] Some commenters also note that the Commission rejected a market share approach as too complex to be used as the standard for waiver of the one-to-a-market rule.[108] We continue to believe that use of market share data would be difficult in that situation because radio and television markets are measured differently. That problem, however, does not exist in terms of the local radio ownership rule we adopt today. Finally, although some commenters argue that stations will artificially restrict their audience share to leave room for purchasing additional stations that may come on the market, we are not persuaded that group owners will adopt such a strategy in today's radio marketplace since ratings directly translate into advertising dollars.

55. We are convinced, however, that there are instances in which the 25 percent audience cap should not be applied. Specifically, we believe that such a cap may unduly preclude stations and listeners in the smallest markets from realizing the benefits that greater common ownership can bring. Because these markets do not have the advertising base to support as many stations as large markets, it may not be possible to acquire even the AM/FM combination permitted under our current rules without exceeding a 25 percent audience cap. However, small stations have for years been struggling financially, many of them in small markets. To avoid adoption of a rule that withholds the benefits of common ownership from those markets that may be most in need of them, we adopt an alternate safeguard for those markets with fewer than 15 stations. In such markets, an entity may not acquire the third station permitted by the numerical caps if that acquisition would result in ownership of 50 percent or more of the stations in the market. In effect, this limitation will ensure that in small markets where the existing rules require three or more separate owners, there will also be three or more separate owners under the new rules.

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of unique problems, we also do not intend to go behind the available data to investigate minor statistical issues, more subtle in nature than the regulatory process is equipped to resolve. In this regard, it is worth noting that audience survey data have been used by the Commission for many years without major difficulties in other contexts and have even been used in the Copyright Act through incorporating our rules by reference. See Cable Television Report and Order, 36 FCC 2d 143, para. 84 (1972) (definition of "local" broadcast signals); Copyright Act of 1976, 17 U.S.C.§111; see also Memorandum Opinion and Order in Docket 83-1009, 100 FCC 2d 74, para. 39 (1984) (use of Arbitron circulation data in national ownership rules); Report and Order in Docket 12782 (1970) (prime time access rule application determined based on ARB prime time market rankings).

[107] For stations outside designated radio markets, share data are the data for all counties that are within the radio market, in whole or in part.

[108] See One-to-a-Market Order, 4 FCC Rcd at 1752.

56. As proposed in the Notice, our rules do not require divestiture if a group owner's local market shares grow to exceed the cap at some time after acquisition, or if the owner's market tier changes. Forced divestiture would in essence punish stations in the first case for excellence in serving the local community, as reflected by listenership gains, and, in the second case, for relatively minor fluctuations in audience share data over which they have no control. For similar reasons, our rules do not require a multiple owner which acquired its stations in compliance with the audience share and numerical stations limits adopted here to break up its station group upon transfer or assignment because the combined share of the group has grown to a level exceeding the 25 percent acquisition limit or the applicable numerical limit has changed. Of course, such a group owner will be precluded from purchasing more stations in the market unless it subsequently falls below the numerical and audience share caps. Furthermore, in order to insure continued monitoring of this area, we hereby instruct the Mass Media Bureau to prepare an annual report concerning the market shares of national and local radio combinations. Based on the data gathered, we expect the Bureau to recommend appropriate Commission action.[109]

57. In no case will we permit same-service simulcasting exceeding 25 percent of the broadcast hours of either simulcasting station where the stations involved serve substantially the same area. For purposes of this limitation, we will consider stations to serve substantially the same area if the principal community contours of the stations overlap and the overlap area constitutes more than 50 percent of the total service area of either station. We see no benefit to the public from permitting commonly owned same-service stations in the same market to substantially duplicate programming.[110] As observed in the Commission's AM Expanded Band Order,[111] when a channel is licensed to a particular community, others are prevented from using that channel and six adjacent channels at varying distances of up to hundreds of kilometers. The limited amount of available spectrum could be used more efficiently by other parties to serve competition and diversity goals. Nor do we believe that substantial same-service simulcasting would aid

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[109] The Commission retains the right, of course, to implement any of a full range of remedies where its analysis suggests that ownership levels in a particular market might threaten the public interest. Such remedies might include a refusal to consent to transfer or assignment applications, a refusal to grant construction permits or the denial of the transfer or assignment of a large station group to a single owner. In extreme cases, we could also require divestiture. In this latter regard, we will carefully review the circumstances through which any station group reaches or exceeds a 40 percent local market share.

[110] Simulcasting, or program duplication, refers to the simultaneous broadcasting of a particular program over co-owned stations serving the same market, or the broadcasting of a particular program by one station within 24 hours before or after the identical program is broadcast over the other station.

[111] AM Expanded Band Order, 6 FCC Rcd 6273, 6329-30 (1991).

economically disadvantaged stations. As commenters submit, same-service simulcasting is unlikely to be profitable for an individual station because the audience for the programming in question will be shared by two or more stations.[112] At the same time, we are persuaded that limited simulcasting, particularly where expensive, locally produced programming such as on-the-spot news coverage is involved, could economically benefit stations and does not so erode diversity or undercut efficient spectrum use as to warrant preclusion. We believe that the restriction we are adopting here appropriately balances these competing concerns.

V. JOINT VENTURES

A. Background

58. As the Notice pointed out, joint ventures provide separately owned stations with efficiencies similar to those available to commonly owned stations by permitting them to function cooperatively via joint advertising sales, shared technical facilities and joint programming arrangements (or "time brokerage"). Such operational joint ventures are not precluded by any Commission rule or policy as long as the Commission's ownership rules are not violated and the participating licensees maintain ultimate control over their facilities. The Notice suggested that these arrangements benefit the radio industry, but noted that more careful review might be warranted in situations where competition in a given market is limited. The Notice therefore questioned whether the Commission should adopt specific qualifications for all joint ventures, including: (1) full and careful compliance with the antitrust laws; (2) a provision that such arrangements be undertaken only with a limited number of stations in large and diverse markets; (3) a requirement that each licensee retain editorial control; and (4) a mechanism for prompt termination of the arrangement when individual participants believe that the agreement is no longer in the public interest. The Notice also suggested that the Commission adopt reporting requirements and questioned whether the Commission's current complaint and compliance procedures are sufficient or should be augmented.

59. In addition to the above proposed qualifications, the Notice asked if specific restrictions should be imposed on stations participating in time brokerage agreements. Time brokerage is a type of joint venture that generally involves the sale by a licensee of "discrete blocks of time to a 'broker' who then supplies the programming to fill that time and sells the commercial spot announcements to support it."[113] The Notice sought comment

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[112] We will continue to permit same-service simulcasting in the limited circumstances delineated in the AM Expanded Band Order. In addition, a broadcaster operating same-service stations within a market pursuant to a waiver of the local ownership rule may continue to simulcast programming on those stations if he or she is currently doing so.

[113] Policy Statement in BC Docket No. 78-355 (Petition for Issuance of Policy Statement or Notice of Inquiry on Part-Time Programming), 82 FCC 2d 107, 107 n.2 (1980). Network affiliation arrangements generally include,

on whether to treat same-service and cross-service time brokerage agreements differently, whether to treat simulcasting differently than other programming arrangements, whether to limit the number of stations a single program supplier may serve, and whether to limit the amount of time a station may broker. In addition, the Notice sought comment on the possible impact of time brokerage on a licensee's renewal expectancy, and asked whether 24-hour-per-day time brokerage circumvents the Commission's ownership restrictions. The Notice further questioned whether time brokerage effectively allows an FM station to extend its own contour into that of another FM station, even though Section 74.1232(d)(1) would prohibit that station from owning an FM translator to accomplish the same purpose. Finally, the Notice asked whether a permissive policy toward joint ventures obviates the need to relax the ownership limits, and vice versa.

B. Comments

60. Most commenters addressing the joint venture issue restrict their comments to time brokerage. The few commenters that discuss other types of joint ventures believe that such arrangements are beneficial, provided there is no antitrust violation.[114] Similarly, most commenters favor time brokerage as a way to help financially struggling stations stay on the air and to strengthen the radio industry.[115] They argue that the current proliferation of time brokerage agreements arose out of economic necessity because the number of radio stations increased dramatically over the past decade, and undermined the competitive position of many broadcasters.

61. The commenters generally oppose additional restriction of time brokerage, arguing that the antitrust laws and current Commission policy are sufficient to prevent abuse. Commenters submit that some time brokerage arrangements are no different than network agreements, which are not restricted.[116] Commenters are particularly opposed to the Commission's proposal that all agreements have a provision permitting one party to terminate if it believes the arrangement is no longer in the public interest, arguing that such a requirement would inhibit the parties' ability to contract freely.[117] Many commenters also assert that a joint venture

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among other things, a variant of time brokerage whereby "the local affiliate sells time to the network in exchange for desirable programming, station compensation, and the opportunity to place local commercials within popular national programs." Id. at 108 n.4.

114 See, e.g., Communications Corporation Comments at 17-18; FTC Reply at 23-24; Group W Comments at 13; Mid-West Family Stations Comments at 8-9.

115 See, e.g., Blackburn & Company Comments at 2; CapCities/ABC Comments at 19; Crown Broadcasting Comments at 5; HVS Partners Comments at 2-6.

116 See, e.g., Group W Comments at 13-14; NAB Reply at 6.

117 See, e.g., Bonneville International Corporation Comments at 14-15; CapCities/ABC Comments at 21; NAB Comments at 28-29.

restriction based on market size would unfairly inhibit small markets.[118] They claim that market conditions will dictate which stations can operate independently and which facilities can best take advantage of time brokerage. A few commenters, however, suggest that the Commission consider market size in evaluating a particular time brokerage arrangement.[119] Commenters that favor time brokerage are divided as to whether the Commission should adopt reporting requirements.[120]

62. Some commenters oppose time brokerage, arguing that it inhibits competition and diversity.[121] These commenters are concerned that stations involved in time brokerage will abdicate their responsibilities as licensees, and that time brokerage is tantamount to a transfer of control. Commenters also assert that time brokerage permits an individual or entity that is not a Commission licensee, or that was once a licensee but was stripped of its license, to control several stations.[122] As a result, these commenters argue, time brokerage is inconsistent with the Commission's statutory duties and its policy of preventing the concentration of control of broadcast facilities. They thus propose strict limitations on time brokerage arrangements.[123]

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118 See, e.g., Bonneville International Corporation Comments at 13-14; NAB Comments at 27; South Fork Comments at 20.

119 See, e.g., Greater Pacific Radio Exchange Comments at 2.

120 See, e.g., Communications Corporation Comments at 17-18; Great American Comments at 5 (in favor of reporting requirements); EBE Communications Comments at 9 (opposes reporting requirements).

121 See, e.g., AHORA Comments at 4; NABOB Comments at 1; TRAC Comments at 20-22; UCC Reply at 9-11.

122 See, e.g., TRAC Comments at 23.

123 For example, TRAC asserts that contracts for time brokerage should be filed with the Commission, that contracts for more than four hours per week to any one programmer should be permitted only with Commission consent, and that the Commission should adopt a 28-hour per week limit on any one station. It asserts that stations brokered more than 28 hours per week should not receive a renewal expectancy, and that no station should be permitted to control the programming on more than two stations in a market or in adjacent markets. NABOB suggests a presumption that AM/AM or AM/FM time brokerage arrangements are within the public interest but that FM/FM arrangements are not. Holston Valley Broadcasting asserts that time brokerage should be limited to situations where the ability of technically disadvantaged stations to reach the established marketplace can be improved. Holston Valley contends that the same rules applied to television networking should apply to radio, including filing of contracts with the Commission and the one affiliate per community limitation. Ragan A. Henry submits that time brokerage agreements should be barred in cases where a major market FM in effect uses neighboring smaller market FM stations as translators.

C. Discussion

63. The comments in this proceeding persuade us that the various operational joint venture arrangements described in the Notice generally strengthen the radio service that the public receives by providing stations that are not commonly owned with economies similar to those available to commonly owned stations. Such arrangements are generally beneficial to the industry and listening audience because they enable stations to pool resources and reduce operating expenses without necessarily threatening competition or diversity. Accordingly, we do not believe that additional regulation of joint ventures other than local time brokerage is necessary or appropriate. We note in this regard that, of the four qualifications proposed in the Notice for all joint venture arrangements, two are currently required of all station licensees -- compliance with the antitrust laws and maintenance of editorial control. Our review of the record persuades us that the third suggestion -- limiting joint ventures to a finite number of stations in large and diverse markets -- would deny the benefits of joint ventures to small markets, where they may be most needed. We also conclude that the fourth proposed qualification -- that joint venture agreements include a mechanism for prompt termination -- could interfere with the parties' ability to contract freely and would make joint venture arrangements unnecessarily impermanent.[124] We have permitted various joint venture arrangements among stations, including joint sales of commercial time, for a number of years[125] and nothing in our experience in that time or in this record suggests that such arrangements have undermined our diversity goals or impaired competition among broadcast stations. Accordingly, we will continue to allow separately owned stations to function cooperatively in terms of advertising sales, technical facilities, formats and other aspects of station operation as long as each licensee retains control of its station and complies with the Communications Act, the Commission's rules and policies and the antitrust laws. Of course, if any new type of joint venture arises involving activity detrimental to the public, such as anticompetitive price fixing or market division, the Commission may adopt further restrictions.

In addition, NABOB and AHORA request that the Commission freeze the use of time brokerage pending the outcome of this proceeding. Because such a freeze would have been unduly disruptive to the radio industry, we did not act on NABOB and AHORA's suggestion.

[124] While we decline to impose specific contractual requirements on licensees concerning termination of time brokerage agreements, we re-emphasize that in this context, as in all others, licensees must maintain control of their facilities and reserve to themselves the ultimate editorial discretion necessary to ensure that their stations program in the public interest and serve the needs of their communities of license.

[125] See, e.g., Report and Order in BC Docket No. 80-438 ("In the Matter of Representation of Stations by Representatives Owned by Competing Stations in the Same Area"), 87 FCC 2d 668 (1981).

64. While we thus conclude that general restraint of joint venture arrangements in broadcasting would be counterproductive, we also believe that the substantial relaxation of the local broadcast ownership rules which we today adopt counsels a more cautious approach where time brokerage of stations in the same market is involved.[126] We are particularly concerned that widespread and substantial time brokerage arrangements among stations serving the same market, in concert with the increased common ownership permitted by our revised local rules, could undermine our continuing interest in broadcast competition and diversity. The record in this proceeding does not suggest that such a result is at all likely.[127] We nonetheless believe it is prudent to preclude the possibility of such an outcome by imposing certain limits on local time brokerage arrangements, at least until we have had some experience with the effects of our new regulatory approach in broadcast markets.

65. Accordingly, to prevent the use of time brokerage to circumvent our new ownership limits, where an individual or entity owns or has an attributable interest in one or more stations in a market, time brokerage of any other station in that market for more than 15 percent of the brokered station's broadcast hours per week will result in counting the brokered station toward the brokering licensee's permissible ownership totals under the revised local ownership rules.[128] Similarly, any such brokered station will also be counted in evaluating compliance with the 30/30 national

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[126] Time brokerage agreements involving stations licensed to different markets raise little public interest concern; indeed they can be difficult to distinguish from network affiliation agreements, of which the Commission has long approved.

[127] Not only has the communications marketplace become increasingly competitive and diverse over the past few years, but a recent survey of broadcast stations conducted by the Commission's Field Operations Bureau also revealed that time brokerage is not a widespread practice. Of 284 stations surveyed, only 17 (or six percent) engaged in time brokerage. Of those 17, only seven indicated that they broker more than half of their broadcast day, and only two radio stations (less than one percent) were engaged in local time brokerage. Public Notice, "Broadcast Station Time Brokerage Survey Completed," Mimeo No. 21878 (Feb. 14, 1992). See also "Your LMA Questions Answered", Radio & Records (Feb. 28, 1992) at 16. Moreover, to the extent time brokerage is a reaction to difficult market conditions, as many commenters argue, the incidence of time brokerage may decrease once the market realigns itself in response to changes to the ownership rules adopted today.

[128] Because this limitation of time brokerage is based in part upon our concern for voice diversity in the local market, it will apply regardless of whether the brokering entity supplies the time-brokered programming from the broker-owned station that is in the same market as the brokered station or from a source outside the brokered market (such as a distant station owned by the broker).

multiple ownership limits which we adopt today. See Section III, supra. In short, we will not permit a local station owner to substantially broker a station in its market which it could not own under our new rules.[129]

66. A similar concern for diversity, as well as for efficient use of the spectrum, underlies our conclusion that licensees should not be permitted through local time brokerage arrangements to effectively simulcast the programming of their station when such simulcasting would be precluded were the licensee to own the brokered station. Accordingly, we will specifically prohibit licensees from duplicating more than 25 percent of their owned-station's programming through brokered stations where the owned station and the brokered station are in the same service and serve substantially the same area, as defined above. See paragraph 57, supra.

67. Finally, in addition to the above restrictions, all time brokerage arrangements will continue to be monitored via the Commission's complaint and compliance process. Further, we will require stations involved in time brokerage agreements to keep copies of those agreements in their public inspection files, with confidential or proprietary information redacted where appropriate, and to file, within 30 days of execution, a copy of any local time brokerage agreement which would result in the arrangement being counted in determining the brokering licensee's compliance with local and national multiple ownership rules.[130] We believe that these requirements will impose a minimal burden on licensees and will make it easier for the Commission and others to properly monitor time brokerage to ensure that licensees retain control of their stations and adhere to the Communications Act, Commission Rules and policies and the antitrust laws.

VI. ANNUAL REPORTING AND INFORMATION GATHERING

68. The Commission historically has gathered information concerning ownership interests among radio broadcasters. In light of the rule changes adopted in this proceeding, we have considered whether we may need to supplement our existing base of information in order to monitor the impact of the new rules on competitiveness, diversity and other aspects of the radio industry. Given our conclusion that the revised rules will strengthen the radio service, we have decided to monitor the rules' efficacy in improving service by radio broadcasters to the public. Therefore, we direct the Mass Media Bureau to prepare an annual report to assess the effect of the revised

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[129] We do not regard time brokerage agreements in which the broker has no cognizable ownership interest in any licensee in the brokered market as posing a significant threat to the integrity of our ownership rules or the diversity and competition principles upon which they are based. Accordingly, we will not count such stations in assessing compliance with our ownership rules nor will we otherwise restrict time brokerage agreements in such circumstances.

[130] This requirement parallels the existing provisions of our rules which oblige licensees to file other relevant contractual agreements within 30 days of their execution. See 47 C.F.R. Section 73.3613.

rules on the radio industry, including their impact on competition, diversity, and minority ownership. In particular, the Bureau is directed to track the market shares of local and national combinations and to recommend to the Commission appropriate action in the event that one entity threatens to dominate local or national radio service. This directive will require the Bureau to gather information from many sources in order to verify and supplement its existing data base. We intend to use our existing form for reporting ownership interests,[131] to the extent possible, to study the respective local and national market shares for group owners, as well as other matters relevant to industry competitiveness and diversity. We will supplement the information provided on this form with such other published sources or our own independent data collection efforts to the extent necessary. Regarding the effect of the rules on minority ownership, the Commission's Office of Minority Enterprise will maintain responsibility for collecting necessary data while the Mass Media Bureau will provide analysis within the context of its annual report.

VII. CONCLUSION

69. The efficacy of Commission ownership rules designed to promote economic competition and viewpoint diversity depends on whether they accurately reflect, and take into account, the realities of the radio broadcasting marketplace. Ownership rules that do not will at the very least be ineffective, and at worst counterproductive, in achieving these goals. Our review of the record in this proceeding confirms that the revisions to the radio ownership rules adopted today will assure that our fundamental public policy goals can continue to be met. In the contemporary marketplace, the proliferation of radio and other mass media outlets assures that no single group owner can dominate the national market and that relaxation of the national ownership caps is therefore appropriate. In the local market, which we find to be the better focus for determining whether viewpoint diversity and competition exist, these same changes indicate that the current duopoly rules may safely be relaxed. In addition, the significant debilitation in the economic strength of many radio stations that has accelerated during the last several years underlines the need to permit greater consolidation. These same considerations warrant allowing separately owned stations to engage in joint ventures subject to Commission regulation and oversight. We stress, of course, that our commitment to competition and diversity will be reflected in our continuing oversight in this area. Should subsequent events dictate the need for adjustments to these new rules, we will not hesitate to act to assure that these fundamental public policy goals continue to be served.[132]

VIII. ADMINISTRATIVE MATTERS

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131 See FCC Form 323, February 1990.

132 As requested by the Notice, the commenters offer suggestions of ways other than those proposed to strengthen radio broadcasting. They are either beyond the scope of this proceeding or would be more appropriately addressed, if at all, in other proceedings.

70. Pursuant to the Regulatory Flexibility Act of 1980, the Final Regulatory Flexibility Analysis for this item is attached as Appendix A.

71. The Secretary shall send a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 4 U.S.C. § 601, et seq. (1981)).

72. The rules adopted here will become effective on August 1, 1992. The Commission will not accept applications based on these new rules until on or after that date.

73. For additional information on this proceeding, contact Jane Hinckley Halprin, Mass Media Bureau, (202) 632-7792.

IX. ORDERING CLAUSES

74. IT IS THEREFORE ORDERED that pursuant to the authority contained in Section 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), Part 73 of the Commission's Rules, 47 C.F.R. § 73, IS AMENDED as set forth in Appendix C, below.

75. IT IS FURTHER ORDERED that the amendments to 47 C.F.R. Part 73 adopted in this Report and Order will be effective August 1, 1992, to allow sufficient time to apply for and receive approval from the Office of Management and Budget.

76. IT IS FURTHER ORDERED that MM Docket No. 91-140 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A
Final Regulatory Flexibility Analysis

I. Need for and Purpose of this Action:

1. This action is taken to relax the Commission's national and local ownership rules and to refine its policies regarding joint ventures. The Commission believes that this action will strengthen the radio industry.

II. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis: None.

III. Significant Alternatives Considered and Rejected:

2. The Commission considered eliminating, rather than relaxing, the national ownership limits. The Commission also considered relaxing the rule using an audience cap or an approach based on market size. After reviewing the comments and pertinent data in this proceeding, the Commission concluded that the 30/30 numerical limit was the most effective and immediate way to benefit the radio industry and the listening public. The Commission also considered a strict numerical, audience based or market rank-based approach to relaxing the local ownership rule in all markets. The Commission concluded that a rule combining all three approaches best accounts for the character of individual markets. Finally, the Commission considered imposing restrictions on joint ventures other than time brokerage arrangements, but concluded that such limitations are unnecessary because such joint ventures can greatly benefit broadcasters and pose little antitrust concern.

APPENDIX B
List of Commenters

Initial Comments [1]

1. American Hispanic Owned Radio Association (AHORA)
2. American Media, Inc.
3. American Women in Radio and Television, Inc. (AWRT)
4. Bonneville International Corporation
5. Gary Burns, Inc.
6. Capital Cities/ABC, Inc.
7. CBS, Inc.
8. Peter B. Collins
9. Communications Corporation
10. Crawford Broadcasting Company
11. Crown Broadcasting, Inc.
12. Degree Communications
13. Demaree Media, Inc.
14. du Treil, Lundin & Rackley, Inc.
15. East Shore Broadcasting Corporation
16. EBE Communications Limited Partnership
17. Fairmont Broadcasting Company
18. Fisher Broadcasting, Inc.
19. Freedom of Expression Foundation, Inc.
20. Fuller-Jeffrey Broadcasting Companies, Inc.
21. Honorable Albert Gore, Jr.
22. Great American Communications Company, Inc.
23. Greater Pacific Radio Exchange, Inc.
24. Group W Radio, Inc.
25. Honorable John Paul Hammerschmidt
26. Ragan A. Henry
27. Holston Valley Broadcasting Corporation
28. HVS Partners and Gary Burns, Inc.
29. Infinity Broadcasting Corporation
30. James Ingstad
31. Robert E. Ingstad
32. Jacor Communications, Inc.
33. KQWB(AM)
34. Marsh Broadcasting Corporation
35. Mid-West Family Stations
36. Murray Communications
37. NAACP, the League of United Latin American Citizens, and the National Black Media Coalition (NAACP)
38. National Association of Black Owned Broadcasters, Inc. (NABOB)
39. National Association of Broadcasters (NAB)
40. Nationwide Communications, Inc.
41. Panhandle Broadcasting, Inc.

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[1] The Office of Communications of the United Church of Christ (UCC) submitted its initial comments on August 6, 1991. Blackburn & Company submitted its comments on August 8, 1991. Pursuant to Section 1.41 of the Commission's Rules, we will consider these late-filed pleadings as informal comments in this proceeding.

42. Salem Communications Corporation
43. Sheboygan County Broadcasting Co., Inc.
44. The Sillerman Companies
45. South Fork Broadcasting Corp.
46. Telecommunications Research and Action Center and Washington Area Citizens' Coalition Interested in Viewers' Constitutional Rights (TRAC)
47. T.G.S. Communications, Inc.
48. 3-D Communications Corporation
49. United States Catholic Conference
50. Universal Broadcasting Corporation
51. Willis Broadcasting Corporation
52. WJTZ(AM)
53. The Woodfin Group

Reply Comments [2]

1. Honorable Lloyd Bentsen
2. Bureau of Economics of the Federal Trade Commission
3. John R. Byrne
4. CBS, Inc.
5. Chabot College
6. Decorah Radio, Inc.
7. Honorable Alan J. Dixon
8. East Shore Broadcasting Corporation
9. Honorable Dante B. Fascell
10. Honorable Harris W. Fawell
11. Honorable Bill Goodling
12. Goodrich Broadcasting, Inc.
13. Honorable Albert Gore, Jr.
14. Honorable Bob Graham
15. Honorable Charles E. Grassley
16. Group W Radio, Inc.
17. Hualapai Broadcasters, Inc.
18. Holston Valley Broadcasting Corporation
19. KIOW-FM
20. Honorable Robert J. Lagomarsino
21. Honorable Howard M. Metzenbaum
22. Honorable Daniel P. Moynihan
23. NAACP, the League of United Latin American Citizens and the National Black Media Coalition
24. National Association of Broadcasters
25. Honorable Ileana Ros-Lehtinen
26. Sample Corporation

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[2] The Office of Communications of the United Church of Christ (UCC) submitted its reply comments on September 6, 1991. Pursuant to Section 1.41 of the Commission's Rules, we will consider this late-filed pleading as informal comments in this proceeding. We also note that over the last few months, we received more than 100 ex parte comments in this proceeding. Those ex parte comments have been included in the record of this Docket.

27. Honorable Paul S. Sarbanes
28. Honorable Louise M. Slaughter
29. South Fork Broadcasting Corporation
30. Robert T. Wertime
31. WKIN/WZXY
32. Honorable Harris Wofford

APPENDIX C
Rule Changes [1]

Part 73 of Title 47 of the U.S. Code of Federal Regulations is amended to read as follows:

1. The Authority Citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. §§ 154, 303.

2. Section 73.3526 is amended by adding new paragraph (a)(12) and revising paragraph (e) to read as follows:

§ 73.3526 Local public inspection file of commercial stations.

(a) * * *

(12) A copy of every agreement or contract involving time brokerage arrangements, with confidential or proprietary information redacted where appropriate.

* * * * *

(e) Period of Retention. The records specified in paragraph (a)(4) of this section shall be retained for periods specified in §73.1940 (2 years). The manual specified in paragraph (a)(6) of this section shall be retained indefinitely. The letters specified in paragraph (a)(7) of this section shall be retained for the period specified in §73.1202 (3 years). The "significant treatment of community issues" list and the records demonstrating the station's response to the educational and informational needs of children specified in paragraph (a)(8) of this section shall be retained by commercial broadcast television licensees for the term of license (5 years). Commercial AM and FM radio licensees shall retain the "significant treatment of community issues list" specified in paragraph (a)(9) of this section for the term of license (7 years). The certification specified in paragraph (a)(10) of this section shall be retained for the period specified in §73.3580 (for as long as the application to which it refers). The records specified in paragraph (a)(12) of this section shall be retained as long as the contract or agreement is in force. The records specified in paragraphs (a)(1), (2), (3), and (5) of this section shall be retained as follows: * * *

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3. Section 73.3555 is amended by revising paragraphs (a), (b), (c), (d), (e) and Note 4 to read as follows:

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[1] Some rules included in this Appendix have been redesignated rather than modified, such as the television contour overlap rule, the one-to-a-market rule, the daily newspaper cross-ownership rule and the television national multiple ownership rule. The entire text of these rules is provided for the convenience of the reader.

§ 73.3555 **Multiple ownership.**

(a) (1) Radio Contour Overlap Rule. No license for an AM or FM broadcasting station shall be granted to any party (including all parties under common control) if the grant of such license will result in overlap of the principal community contour of that station and the principal community contour of any other AM or FM broadcasting station directly or indirectly owned, operated, or controlled by the same party, except that such license may be granted in connection with a transfer or assignment from an existing party with such interests or in the following circumstances:

(i) In radio markets with 14 or fewer commercial radio stations, a party may own up to 3 commercial radio stations, no more than 2 of which are in the same service (AM or FM), provided that the owned stations, if other than a single AM and FM station combination, represent less than 50 percent of the stations in the market.

(ii) In radio markets with 15 to 29 commercial radio stations, a party may own up to 2 AM and 2 FM commercial stations, provided that the combined audience share of those stations does not exceed 25 percent.

(iii) In radio markets with 30 to 39 commercial radio stations, a party may own up to 3 AM and 2 FM commercial stations, provided that the combined audience share of those stations does not exceed 25 percent.

(iv) In radio markets with 40 or more commercial radio stations, a party may own up to 3 AM and 3 FM commercial stations, provided that the combined audience share of those stations does not exceed 25 percent.

(2) (i) Where the principal community contours of two stations in a market overlap and a party (including all parties under common control) with an attributable ownership interest in one such station brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (a) and (e). This limitation shall apply regardless of the source of the brokered programming supplied by the party to the brokered station.

(ii) Every time brokerage agreement of the type described in subparagraph (a) (2) (i) above shall be undertaken only pursuant to a signed written agreeement that shall contain a certification by the licensee or permittee of the brokered station verifying that it maintains ultimate control over the station's facilities, including specifically control over station finances, personnel and programming.

(iii) Any party operating in conflict with the requirements of paragraph (a) (2) (i) above on the effective date of this rule shall come into compliance within one year thereafter.

(3) For purposes of this paragraph:

(i) The "principal community contour" for AM stations is the predicted or measured 5 mV/m groundwave contour computed in accordance with §73.183 or §73.186 and for FM stations is the predicted 3.16 mV/m contour computed in accordance with §73.313.

(ii) A "radio market" is defined as a designated radio metro market for stations assigned to such markets. For stations not assigned to a designated radio metro market, the "radio market" is the area encompassed by the principal community contours of the stations in question (i.e. the station for which a Commission authorization is sought and any station that would be commonly owned whose principal community contour overlaps the principal community contour of that station). A designated radio metro market is a market so designated by Arbitron based on Arbitron's established standards or by a comparable independent professional audience survey organization applying generally accepted industry standards and generally coinciding with metropolitan statistical areas.

(iii) The "number of stations in a market," if the market is a designated radio metro market, is the number of commercial radio stations in the market that meet minimum audience survey organization reporting standards and, if the market is not a designated radio metro market, is the number of commercial radio stations in the market whose principal community contours fall within the radio market, in whole or in part.

(iv) A station's "audience share" is the average number of persons age 12 or older on an average quarter-hour basis, Monday-Sunday, 6 a.m.-midnight, who listen to the station, expressed as a percentage of the average number of persons listening to rated commercial AM and FM stations in its radio market. The "combined audience share" is the total audience share of all AM or FM stations that would be under common ownership or control following a proposed acquisition. For stations assigned to designated radio metro markets, the most recent published audience share data available at the time an application is filed with the Commission shall be used to calculate the combined audience share of the relevant AM or FM stations. For stations outside designated radio metro markets, the relevant audience share data are the data for all counties that are within the radio market, in whole or in part.

(v) "Time brokerage" is the sale by a licensee of discrete blocks of time to a "broker" that supplies the programming to fill that time and sells the commercial spot announcements in it.

(vi) Where overlap of the principal community contours of stations in separate markets takes place, for purposes of applying paragraph (a) of this section, the rules applicable to the market in which the overlap takes place shall be applied. If the overlap takes place in both markets, the limits applicable to the market with the smallest number of commercial stations shall be applied. For purposes of determining in which market the overlap occurs, markets that are not designated radio markets shall not be deemed to include areas that are part of a designated market.

(b) Television Contour Overlap (Duopoly) Rule. No license for a TV broadcast station shall be granted to any party (including all parties under common control) if the grant of such license will result in overlap of the Grade B contour of that station (computed in accordance with Section 73.684) and the Grade B contour of any other TV broadcast station directly or indirectly owned, operated, or controlled by the same party.

(c) One-to-a-market Ownership Rule. No license for an AM, FM or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates or controls one or more such broadcast stations and the grant of such license will result in:

(1) The predicted or measured 2 mV/m groundwave contour of an existing or proposed AM station, computed in accordance with § 73.183 or § 73.186, encompassing the entire community of license of an existing or proposed TV broadcast station(s) or the Grade A contour(s) of the TV broadcast station(s), computed in accordance with § 73.684, encompassing the entire community of license of the FM station; or

(2) The predicted 1 mV/m contour of an existing or proposed FM station, computed in accordance with § 73.313, encompassing the entire community of license of an existing or proposed TV broadcast station(s) or the Grade A contour(s) of the TV broadcast station(s), computed in accordance with § 73.684, encompassing the entire community of license of the FM station.

(d) Daily Newspaper Cross-Ownership Rule. No license for an AM, FM or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates or controls a daily newspaper and the grant of such license will result in:

(1) The predicted or measured 2 mV/m contour for an AM station, computed in accordance with § 73.183 or § 73.186, encompassing the entire community in which such newspaper is published; or

(2) The predicted 1 mV/m contour for an FM station, computed in accordance with § 73.313, encompassing the entire community in which such newspaper is published; or

(3) The Grade A contour for a TV station, computed in accordance with § 73.684, encompassing the entire community in which such newspaper is published.

(e) (1) National Multiple Ownership Rule. No license for a commercial AM, FM or TV broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors, directly or indirectly, owning, operating or controlling, or having a cognizable interest in:

(i) more than 30 AM or more than 30 FM stations, or

(ii) more than 14 television stations, or

(iii) more than 12 television stations that are not minority-controlled.

(2) No license for a commercial TV broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors, directly or indirectly, owning, operating or controlling, or having a cognizable interest in, either:

(i) TV stations which have an aggregate national audience reach exceeding thirty (30) percent, or

(ii) TV stations which have an aggregate national audience reach exceeding twenty-five (25) percent and which are not minority-controlled.

(3) For purposes of this paragraph:

(i) "National audience reach" means the total number of television households in the Arbitron Area of Dominant Influence (ADI) markets in which the relevant stations are located divided by the total national television households as measured by ADI data at the time of a grant, transfer or assignment of a license. For purposes of making this calculation, UHF television stations shall be attributed with 50 percent of the television households in their ADI market. Where the relevant application forms require a showing with respect to audience reach and the application relates to an area where Arbitron ADI market data are unavailable, then the applicant shall make a showing as to the number of television households in its market. Upon such a showing, the Commission shall make a determination as to the appropriate audience reach to be attributed to the applicant.

(ii) "TV broadcast station" or "TV station" exclude stations which are primarily satellite operations.

(iii) "Minority-controlled" means more than 50 percent owned by one or more members of a minority group.

(iv) "Minority" means Black, Hispanic, American Indian, Alaska Native, Asian and Pacific Islander.

* * * * *

Note 4: Paragraphs (a) through (e) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities, and will not apply to applications for increased power for Class IV stations, to applications for assignment of license or transfer of control filed in accordance with § 73.3540(f) or § 73.3541(b) of this Part, or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy if no new or increased overlap would be created between commonly owned, operated, or controlled broadcast stations in the same service and if

no new encompassment of communities proscribed in paragraphs (b) and (c) of this section as to commonly owned, operated, or controlled broadcast stations or daily newspapers would result. Said paragraphs will apply to all applications for new stations, to all other applications for assignment or transfer, and to all applications for major changes in existing stations except major changes that will result in overlap of contours of broadcast stations in the same service with each other greater than already existing. (The resulting areas of overlap of contours of such broadcast stations with each other in such major change cases may consist partly or entirely of new terrain. However, if the population in the resulting areas substantially exceeds that in the previously existing overlap areas, the Commission will not grant the application if it finds that to do so would be against the public interest, convenience or necessity.) Commonly owned, operated or controlled broadcast stations with overlapping contours or with community-encompassing contours prohibited by this section may not be assigned or transferred to a single person, group or entity, except as provided above in this note and by § 73.3555(a). If a commonly owned, operated, or controlled broadcast station and daily newspaper fall within the encompassing proscription of this section, the station may not be assigned to a single person, group or entity if the newspaper is being simultaneously sold to such single person, group or entity.

4. Section 73.3556 is added to read as follows:

§ 73.3556 Duplication of Programming On Commonly Owned or Time Brokered Stations

(a) No commercial AM or FM radio station shall operate so as to devote more than 25 percent of the total hours in its average broadcast week to programs that duplicate those of any station in the same service (AM or FM) which is commonly owned or with which it has a time brokerage agreement if the principal community contours (predicted or measured 5 mV/m groundwave for AM stations and predicted 3.16 mV/m for FM stations) of the stations overlap and the overlap constitutes more than 50 percent of the total service area of either station.

(b) For purposes of this section, duplication means the broadcasting of identical programs within any 24 hour period.

5. Section 73.3613 is amended by revising paragraph (d) and adding new paragraph (e) to read as follows:

§ 73.3613 Filing of contracts.

* * * * *

(d) Time brokerage agreements: Time brokerage agreements where the licensee (including all parties under common control) is the brokering entity, there is a principal community contour (predicted or measured 5 mV/m groundwave for AM stations and predicted 3.16 mV/m for FM stations) overlap with the brokered station, and more than 15 percent of the time of the brokered station, on a weekly basis, is brokered by that licensee.

Confidential or proprietary information may be redacted where appropriate but such information shall be made available for inspection upon request by the FCC.

(e) The following contracts, agreements or understandings need not be filed but shall be kept at the station and made available for inspection upon request by the FCC: subchannel leasing agreements for Subsidiary Communications Authorization operation; franchise/leasing agreements for operation of telecommunications services on the TV vertical blanking interval; time sales contracts with the same sponsor for 4 or more hours per day, except where the length of the events (such as athletic contests, musical programs and special events) broadcast pursuant to the contract is not under control of the station; and contracts with chief operators.

APPENDIX D
Analysis of Selected Markets

For a sample of 10 markets in each of the categories defined by the Commission, the attached tables show the number of rated radio stations (No. of Stns.) and the average audience share (Share Average) for an AM and an FM station.[1] The tables demonstrate that a single licensee buying typical facilities in these markets will generally fall well under the 25 percent audience cap. In addition, the tables show that the 25 percent audience cap will generally prevent one owner from acquiring all the top-rated stations before exceeding the numerical cap. The other information on each table is designed to show the implications of the new rule by market size categories as follows:

Table 1: Markets with 40 or More Rated Stations - In these markets an owner may acquire up to 3 AM and 3 FM stations as long as the combined audience share of these stations does not exceed 25%. This table indicates the audience share that would be served by one owner acquiring 3 typical AM and 3 typical FM stations (Total Share of 3 Avg AM + 3 Avg FM), the cumulative audience share of the 3 top-rated stations in each service (Top 3 Share) and the total audience that would be served by one owner (Total Share of Top 3 AM & Top 3 FM), if that owner acquired the maximum number of top-rated stations in each service.

Table 2: Markets with Between 30 and 39 Rated Stations - In these markets an owner may acquire up to 3 AM and 2 FM stations as long as the combined audience share of these stations does not exceed 25%. This table indicates the audience share that would be served by one owner acquiring 3 typical AM and 2 typical FM stations (Total Share of 3 Avg AM + 2 Avg FM), the cumulative audience share of the 3 top-rated AM stations (Top 3 AM Share), the cumulative audience share of the 2 top-rated FM stations (Top 2 FM Share) and the total audience that would be served by one owner (Total Share of Top 3 AM & Top 2 FM), if that owner acquired the maximum number of top-rated stations in each service.

Table 3: Markets with 15 to 29 Rated Stations - In these markets an owner may acquire up to 2 AM and 2 FM stations as long as the combined audience share of these stations does not exceed 25%. This table indicates the audience share that would be served by one owner acquiring 2 typical AM and 2 typical FM stations (Total Share of 2 Avg AM + 2 Avg FM), the cumulative audience share of the 2 top-rated stations in each service (Top 2 Share) and the total audience that would be served by one owner (Total Share of Top 2 AM & Top 2 FM), if that owner acquired the maximum number of top-rated stations in each service.

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[1] Source: James Duncan, American Radio Spring 1991 and American Radio Small Market Report 1991.

Examples of AM and FM Shares for Each Market Category

Table 1
Markets With 40 or More Rated Stations:

Market	No. of Stns.		Share Average	Total Share of 3 Avg AM+ 3 Avg FM	Top 3 Share	Total Share of Top 3 AM & Top 3 FM
San Fran.	47			11.1		30.5
		AM	1.7		16.9	
		FM	2.0		13.6	
New York	44			11.7		27.4
		AM	1.7		12.3	
		FM	2.2		15.1	
Providence-N. Bedford-Fall River	44			11.7		36.9
		AM	1.4		14.5	
		FM	2.5		22.4	
San Jose (San Fran.)	44			12.0		33.5
		AM	1.6		15.4	
		FM	2.4		18.1	
Monmouth, NJ (New York)	43			12.0		28.3
		AM	1.8		12.6	
		FM	2.2		15.7	
Wilkes Barre-Scranton	42			11.7		43.4
		AM	1.6		14.5	
		FM	2.3		28.9	
Riverside (L.A.)	42			11.7		33.5
		AM	1.4		10.8	
		FM	2.5		22.7	
Los Angeles	40			13.2		26.9
		AM	2.0		19.6	
		FM	2.4		27.1	
Nassau-Suffolk (New York)	40			13.2		26.9
		AM	1.9		11.1	
		FM	2.5		15.8	
Portsmouth (Boston)	40			12.6		37.6
		AM	1.9		10.9	
		FM	2.3		26.7	

Table 2
Markets With Between 30 and 39 Rated Stations

Market	No. of Stns.		Share Average	Total Share of 3 Avg AM+ 2 Avg FM	Top 3 AM Share	Top 2 FM Share	Total Share of Top 3 AM & Top 2 FM
Boston	39			10.8			30.0
		AM	2.0		17.3		
		FM	2.4			12.7	
Miami	36			11.1			26.2
		AM	1.5		11.6		
		FM	3.3			14.6	
San Diego	36			11.5			28.8
		AM	1.9		16.2		
		FM	2.9			12.6	
Wash., D.C.	35			10.6			23.6
		AM	1.6		10.4		
		FM	2.9			13.2	
Baltimore	35			12.3			30.4
		AM	2.3		14.0		
		FM	2.7			16.4	
Denver	33			12.6			29.7
		AM	1.4		10.8		
		FM	4.2			18.9	
Pittsburgh	32			13.1			39.5
		AM	2.1		22.1		
		FM	3.4			17.4	
Seattle	31			13.1			31.2
		AM	2.1		18.6		
		FM	3.4			12.6	
Phila.	30			13.3			29.6
		AM	2.1		16.3		
		FM	3.5			13.3	
St. Louis	30			14.8			37.7
		AM	2.4		22.5		
		FM	3.8			15.2	

Table 3
Markets With 15 To 29 Rated Stations

Market	No. of Stns.		Share Average	Total Share of 2 Avg AM+ 2 Avg FM	Top 2 Share	Total Share of Top 2 AM & Top 2 FM
Salt Lake City, UT	29			11.6		31.0
		AM	1.9		8.3	
		FM	3.9		22.7	
San Antonio, TX	29			13.2		31.9
		AM	1.8		12.1	
		FM	4.8		19.8	
Fresno, CA	27			13.0		35.7
		AM	3.0		16.3	
		FM	3.5		19.4	
Milwaukee, WI	26			14.0		36.5
		AM	2.8		19.4	
		FM	4.2		17.1	
Portland, OR	24			13.8		32.3
		AM	2.4		14.4	
		FM	4.5		17.9	
Grand Rapids, MI	22			13.4		28.7
		AM	1.8		10.3	
		FM	4.9		18.4	
McAllen, TX	20			18.6		37.2
		AM	3.0		16.6	
		FM	6.3		20.6	
Indianapolis, IN	20			16.8		43.1
		AM	3.0		18.7	
		FM	5.4		24.4	
Jackson, MS	18			17.0		42.6
		AM	2.3		12.8	
		FM	6.2		29.8	
Madison, WI	17			18.2		36.3
		AM	2.9		11.1	
		FM	6.2		25.2	

Statement of Commissioner James H. Quello

Report and Order,
Revision of Radio Rules and Policies

As has become clear to everyone familiar with the radio industry, we are living in a totally different world today than in 1953 when our ownership rules were adopted. At that time, it was difficult for a person who had a radio license to fail. But today, with the splintering of formats and the advent of competition from new nonbroadcast media, it is difficult to succeed. The problems facing radio are not the result of a temporary slump brought on by a bad economy. They go to the heart of radio's future as a viable mass medium in this country.

I think this Report and Order is a responsible attempt to address these new realities. Of course, reasonable people may disagree about the precise number of stations that a single owner should be permitted to acquire. Some have suggested that there should be no limits — a position with which I cannot agree. Others have argued that there should be no change, and, again, the facts force me to reach a different conclusion. Once it became clear that we must find a middle ground, it also became clear that there is no metaphysically perfect answer. Perhaps no politically perfect answer, either.

Recognizing the difficulty of this task, Chairman Sikes took particular care in this proceeding to provide all offices with the findings of the Mass Media Bureau and solicited ideas from all of the Commissioners. Of all of the proceedings that have come before this agency since the Chairman arrived in 1989, I believe this proceeding has involved the most open exchange of views among the Commissioners. The give and take was genuine, and the Chairman should be commended.

This does not mean that the final outcome is what I would have crafted myself. I initially believed that the national ownership caps could have been relaxed even more, since there is no danger that a single owner could dominate the national radio market. This is particularly true when the level of concentration in radio is compared to that in the cable television or publishing industries. In the end, however, I was persuaded that a more moderate approach to altering the national ownership limits would allow the Commission to monitor the effect of rule changes. If experience reveals that we have chosen the wrong number, there will be time enough to address the situation.

Similarly, if I had the only vote, I would have been somewhat more cautious in altering the duopoly rules. In particular, I am uneasy about allowing ownership of three AM and three FM stations in a single market. I would have preferred setting the limit at two AM and two FM stations. Ultimately, I was willing to go along because such levels of ownership will be allowed only in the very largest markets and will be subject an audience cap of 25 percent. Additionally, the Mass Media Bureau will prepare an annual report on the effect of these changes, and we will be able to revisit the question of duopoly limits, if it becomes necessary.

There undoubtedly will be spirited disagreements about the final choices we have made, just as there were among all the Commissioners who chose to participate in the extensive internal debates in this proceeding. To critics, I would simply suggest that a good starting point for discussion would be to indicate what makes one policy choice inherently more reasonable than another.

The one point about which all agree is that the radio industry is in bad shape. There may be many causes for this, but to debate them and point fingers is not very productive. We have been considering the volumes of comments in this proceeding for most of a year and the time to act is upon us.

I may not be entirely comfortable with our choice, but I am completely at ease with the honest, open and thorough process by which we reached it.

April 10, 1992

STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT
DISSENTING IN PART AND CONCURRING IN PART

IN RE: REVISION OF RADIO RULES AND POLICIES [MM DOCKET NO. 91-140]

On March 12, 1992, I issued a separate statement indicating my abstention from the action taken in this docket by my fellow Commissioners on that day. Much of that statement reflected my concern regarding the process by which the majority had reached their decision to modify the multiple ownership rules for the AM and FM radio industry. At the time of the vote, I had general background material from the Mass Media Bureau, and only a 3 page document stating what the new national ownership, local ownership, and joint venture rules would look like. Other than that, I had a prior draft of an Order from the Mass Media Bureau that recommended eliminating the national rules, and imposed a 25% audience share cap for local ownership. The three-page document provided to me the afternoon before the meeting contained no explanations for the new 30 AM and 30 FM national ownership cap. There were no explanations for the new four-tier local ownership labyrinth voted on by the Commission. Nor was there any detailed market-by-market analysis showing the potential impacts of the new rules. Thus, as a procedural matter, I abstained from voting on this item at the March 12 agenda meeting.

Now, there is an Order to review which attempts to explain the basis for the decisions made on March 12.[1] My vote on this action reflects remaining concerns about the selective economic rationale used to justify this Order, and the lack of record support for some of the actions taken in this Order. Specifically, my vote reflects some remaining trepidations about the lack of underlying support for the March 12 decision to substantially relax the national multiple ownership limits from 12 AM and 12 FM commercial radio stations [14 AM and 14 FM if at least two stations are minority-owned or controlled] to 30 AM and 30 FM commercial radio stations without any minority incentives. Also, my vote reflects serious substantive concerns about the decision to drastically modify the local ownership limits from 1 AM and 1 FM commercial radio station in a local market to a complicated four-tier labyrinth that allows one owner to acquire up to 6 commercial radio stations, 3 AM and 3 FM, in the local market. Further, while, in general, I support the new joint venture rule, I remain cautious due to the cumulative impact of these rules in conjunction with the new national and local rules.

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[1] Report and Order in MM Docket No. 91-140, FCC 92-97, (released April 10, 1992) ("Order").

Finally, my vote reflects serious skepticism about the efficacy of the Commission's decision to utilize annual reports to monitor radio market activities. While I applaud the intent of my fellow Commissioners, I remain extremely skeptical that anything will ever be done with these reports; or whether the reports will even make sense. Thus, I dissent to the majority's decision to adopt new national ownership limits of 30 AM and 30 FM commercial radio stations. I also dissent with respect to the majority's decision to adopt a complicated, four-tier local ownership labyrinth, complete with complex audience share and market rank baggage. I concur to portions of the Order which address restrictions on local Time Brokerage Agreements. I also concur with the intent to conduct a survey of the market impact of the new rules on competition, diversity and minority ownership. However, I disagree with the deregulatory approach taken which could make the report ineffective; further, there are no indications of what type of specific criteria the Commission would establish to take actions in response to these reports.

At the outset, I want to make clear that my disagreement with the majority is not based on the process leading up to the March 12 vote. Rather, it is based on the underlying arguments used to justify certain actions, particularly in the local markets. Had I been in possession of this version of the Order on or before March 12, my earlier statement on this matter would have been more specific. In some areas, like the national rules and time brokerage, the majority and I are not that far apart. Moreover, we do not disagree on the need to take action to help the economic plight of radio stations. Nor do we disagree that the radio market is competitive. What we disagree on is the response to these market factors. A more cautious approach to deregulation of the national rules, phased-in over time, supported by proposals in the record, and with an effective minority incentive, could have changed my vote on these rules. Without taking into account the impact of the new local rules, we basically agree on the types of restrictions necessary in the time brokerage area.

Further, with a more cautious approach to deregulation of the national and local rules, I would have been less skeptical about the Commission's intentions to seriously take actions based on annual reports provided by the Mass Media Bureau. However, regardless of how long we talked, I never could have supported the local ownership rules adopted in this Order. I believe the record supports relaxing the local rules to 2 AMs and 2 FMs in most local markets. The record does not support this 6, 5, 4, 3 labyrinth, with associated audience share and four-tier market rankings. I continue to believe the new local rules are an invite to disaster, and are not supported by the record.

Moreover, I believe that the combined cumulative effect of the national and local rules could lead to regional

concentrations which will be detrimental for small group owners and independent station owners in the local markets; particularly in light of the flexibility that the Order allows with regard to time brokerage and joint ventures outside of local markets. It is the cumulative "real-market" impact of the national, local, and time brokerage rules that I am most concerned about. From the start, I have contended that one must focus on the cumulative effect of these rules before making a final decision. Unfortunately, I believe the majority approached these subjects in a piecemeal fashion, without regard for the cumulative impact on small group owners, independent owners and new entrants in the local radio markets. Why should small radio players and new entrants be penalized for prior decisions the Commission made to allocate nearly 700 new FM radio stations in Docket 80-90, or add as many AM stations as possible? While I agree with a general view that allocating more stations during the 1980's was not necessarily better for radio industry economics, I do not agree that the Commission must now "cut off" new entrants and small players at the knees in order to reshuffle the economics of the radio industry. Yet, the cumulative effect of the new radio ownership rules has the potential to do just that. Instead of taking an approach that would create additional economic activity in the long term, the majority embarks on a quick-fix program that will result in shorter-term bursts of radio station trading. The beneficiaries of such shorter-term activities will be station brokerage companies, a few large group owners, and the lawyers representing these entities. The likely losers from this action will be small radio group owners, stand alone radio station licensees, small market radio station licensees, new entrants, and last, but not least, the listening public.

The following describe and explain my remaining substantive concerns with the Order released today by the majority:

New National Ownership Rules: 30 AM and 30 FM

The majority establishes 60 stations as the national limit. It seems to be based on an extrapolation of a national number between those commenters who advocated total elimination, and those commenters who advocated relaxed numbers between 18-25 radio stations per service.[2] As I indicated in my abstention

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[2] Although footnote 58 in the Order attempts to also cite the FCC's longstanding experience regulating the radio industry, this appears to be a veiled attempt to justify 30 AM/30 FM limit based on wishful thinking. A review of industry data reflected the need for relaxation of the rules; however, it did not call for a national ownership limit that was not proposed by parties who sought relaxation of the rules [i.e. Group W 25/25; Sillerman 25/25; Bonneville 18-24 per service; Cap Cities/ABC 30 overall, not 60 overall; and Radio Operators Caucus of NAB 25/25 and 2/2

statement, 30 radio stations per service and 60 radio stations nationally gives me concerns for several reasons: (1) There are cyclical aspects to our economy, including the recession and corporate restructurings which have impacted advertising revenues. Fortune magazine recently indicated that many of the top companies in the Fortune 500 had declining revenues in 1991. Earnings are expected to improve this year.[3] Other articles show how corporate advertisers have cut their advertising budgets.[4]

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for local rules.]. [See Appendix 1 for further summary of proposals submitted by commenters seeking to relax the national rules.] Nonetheless, the majority eagerly inserts their own personal, apparently long-standing, experience with radio ownership and radio market dynamics in the place of proposals offered by these radio industry players. While I support careful, systematic approaches to deregulation, I cannot support this "broad brush" approach to deregulation.

[3] The April 6, 1992 issue of Fortune magazine reports:

> "Later this year companies should start benefitting from the dramatic, durable cost reductions that have characterized the slow-growth environment of the last three years."
>
> "A Boom Ahead in Company Profits" by Shawn Tully, p. 76.

See also 1991 Veronis, Suhler & Associates Communications Industry Forecast (1991-1995), in which Veronis, Suhler reports at pp. 46-47:

> Advertiser spending on radio is expected to grow 4.0 percent in 1991, well above the print media and faster than television's 2.7 percent estimated growth."

On the whole, growth in advertiser spending in radio should keep pace with that of television, and will out-pace other measured media.

[4] Ad spending by 7 of top 10 network TV advertisers was down in 1991, according to Arbitron's Media Watch. Two advertisers joined top 10 in 1991, Chrysler spending $176.1 million (down 7% from 1990) and Toyota with $173.6 million (up 2%), at 9th and 10th, respectively. Dropping from list were AT&T (5th in 1990) with $172 million (down from $245 million) and McDonalds (7th in 1990) with $171.8 million, down from $231 million. Although GM ad spending dropped 12% in 1991, it remained top spender with $527.8 million. Rest of top 10: (2) P&G $515.6 million, down 8%. (3) Philip Morris $390.1 million, down 3%. (4) Johnson & Johnson $239.8 million, up 13%. (5) Kellog Co. $236.5 million, down 21%. (6) Ford $217.4 million, up

Clearly, these aspects of the economy have an impact on radio revenues, as well as other advertising media. According to some recent reports, the economy has begun the recovery process.[5] There also have been increases in local radio "advertising revenues.[6] Thus, I did not believe that we should address both the impact of the recession, and the obvious increase in competition for ad revenues from cable, broadcast television and newspapers, through drastic changes to the structural rules. Instead, I would have preferred more modest changes in the structural rules, and then proceeded to address the shorter-term impact of the recession and corporate restructurings by providing additional flexibility in the time brokerage area; (2) The new 30 AM/30 FM national limit represents a 150% increase over the former 12/12 limit on national radio ownership. During the course of this proceeding, I proposed a national limit of 25 AMs/25 FMs with five additional stations per service if the stations are minority-owned or controlled. Based on the totality of the record before me, I viewed 25 stations per service as the outer limit of what was proposed by those experienced radio industry commenters favoring relaxation (i.e. Group W, Sillerman, Radio Operators Caucus etc.). Those proposing relaxation instead of elimination of the national rules advocated changes between 18-25 per service [i.e. Bonneville, Group W]. Cap Cities ABC proposed changes of only 30 total stations, as opposed to the 60 total stations allowed under the new rules. Thus, I had more confidence in their judgments than in any attempt by the Commission to figure things out on its own. See Appendix 1 attached. My proposed change already represented more than a 100% increase over the former 12/12 limits. As an integrated, but cautious approach to deregulation, I would have supported such action at the time of my proposal prior to the March 12 decision; particularly in light of my more cautious local ownership proposal of 2 AM/2 FM, and my support for flexible time brokerage rules; and (3) The 30/30 limit included no minority incentive, consistent with the former structure of 14/14.

10%. (7) Pepsico $204.5 million, up 6%. (8) Sears Roebuck $187.8 million, down 23%. Total billings on ABC, NBC and CBS TV networks in 1991 -- $9.45 billion -- were down 7% from $10.1 billion in 1990. Communications Daily, March 31, 1992.

[5] Local radio revenues increased 4% in Feb. . . . RAB Pres. Gary Fries called local results "an encouraging sign. . . Retailers are beginning to bounce back." Communications Daily, April 2, 1992.

[6] Radio Business Report (RBR) reports that in February, local radio revenue was up more than 6%, even better than the 4.5% earlier reported. RBR, March 30, 1992, p. 5.

Minority Incentives

In my March 12 statement, I seriously questioned the majority's rationale for eliminating the minority incentive from the new national rules. I stated at the March 12 meeting, that the present Commission inherits the legacy of the minority ownership policies. They were in place before I arrived at the Commission. I view them as policies which address matters of fundamental fairness. These policies have been upheld in the Courts and mandated by Congress. Thus, I believe that the majority decision to eliminate the "minority incentive" in the national rules ran contrary to the FCC's public interest goals.

Our minority ownership rules have been in place for some time, dating back to the TV9 case in 1973 and our 1978 Minority Ownership Policy Statement.[7] Since 1984, the Commission has operated with a 14/14 structure that gave both minorities and non-minorities additional structural incentives to deal in the marketplace. Despite prior Commission efforts to review and possibly restrict minority ownership policies, they have been mandated by Congressional actions under appropriations legislation [since 1987], and upheld in the courts under the 1990 Metro case.[8] Thus, the present Commission inherits these policies; they are not of my doing alone.

In 1984's 12/12 and 14/14 decision we stated: "that our national multiple ownership rules may, in some circumstances, play a role in fostering minority ownership."[9] Thus, the 14/14 national ownership minority incentive was included in the

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[7] TV 9, Inc. v. FCC, 495 F.2d 929 (1973), cert. denied, 419 U.S. 986 (1974) determined that "when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded." Id. at 937-938. See also, 1978 Minority Policy Statement, 68 FCC 2d 979 (1978) and See Memorandum Opinion and Order, in Gen. Docket No. 83-1009, 100 FCC 2d 75 (1985).

[8] See Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990). See also, the appropriations legislation signed by the President in December, 1987 which contained language providing that no funds "shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sale and tax certificates granted . . . to expand minority and women ownership of broadcasting licenses . . . which were effective prior to September 12, 1986. . . ." See further, Act of October 28, 1991, Pub. L. 102-140.

[9] Memorandum Opinion and Order in Gen Docket No. 83-1009, 100 FCC 2d 75, 94 (1985).

national ownership rules. As a result, I was surprised that the Commissioners did not view the need for a similar structure in the current rules.[10]

It appears that the majority argues that minority incentives in the structural rules are not viewed as an effective part of our minority ownership policies. They cite AHORA, NABOB, the NAACP and TRAC for this proposition. I think this is an interesting and somewhat disingenuous way to make an argument. For example, NABOB's overall point seemed to be that very few people are at or near the 12/12 limit; according to the Order, no one is currently at the 14/14 limit. Footnote 64 of the Order lists 4 entities: Ragan Henry 9AM/12FM; Bishop Willis 13AM/13FM; Cap Cities/ABC, Inc. 11AM/10FM; and CBS 8AM/13FM]. Of the two minority broadcasters near the 12/12 or 14/14 limit, [i.e. Ragan Henry & Bishop Willis] neither is ranked in the top 30 group owners listed in Attachment 2 of the Mass Media Bureau radio industry report; a report which is part of the record of this proceeding.[11] Thus, NABOB's comments seem to indicate that further study is needed to review the impact of the 1984 structural rule changes [i.e. 14/14] on minority ownership before making further drastic changes. The majority leave out the last part of NABOB's arguments, and decided, without seeking further comment, and without deference to the Congressional appropriations rider on minority ownership policies, that 14/14 made no sense. Thus, they decided that 30/30 needed no minority incentive.[12] Instead, they say that we can continue to rely on distress sales, tax certificates, and comparative hearings. I

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[10] Two of my colleagues seem to have implied that I invented the minority ownership incentive at the time of my March 4 proposal in this docket. Clearly, the history of these rules indicates otherwise.

[11] See Attachment 2 of Overview of the Radio Industry, Mass Media Bureau, January 1992.

[12] I also note that in para. 26 of the Order, the majority admits that minority ownership in the radio industry remains at a disturbingly low level. They fail however to cite the percentage of total ownership statistics which NABOB provides. Thus, to balance the potential misimpression left by the percent ownership increases cited in footnote 63 of the Order, I want to ensure that the public understands the overall impact of NABOB's statistics: In 1980 1.57 % of all radio stations were black-owned; in 1991, 1.64 % of all radio stations were black-owned. That amounts to a whopping .07% increase in black-owned radio stations relative to the total number of radio stations over an 11-year period. I am glad the majority emphasizes that minority ownership remains a central concern and important goal of the Commission. Clearly, more progress is needed.

find that argument interesting since we haven't granted any distress sales to minorities since 1988, and only 38 have been granted since the inception of the policy.[13] Thirty-eight out of 11,000 radio stations is not exactly a phenomenal record. Further, in a recent notice on comparative "new" hearings, it appears that we are asking questions that could dilute the diversification criteria; thus, potentially impacting new entrants, including minorities and women, more negatively.[14]

Finally, it is not clear to me that the benefits of the 14/14 rule to minorities and non-minorities has been fully understood. Thus, I question the majority's reliance on the remaining minority ownership policy alternatives alone as justification for not including a minority incentive as part of the new national ownership structure. I am quite disturbed about this aspect of the decision. While I agree that minorities and other new entrants are in need of greater financing alternatives, I question the extent to which the majority summarily decided that structural rules are not a significant part of the incentives for non-minorities and minorities to deal in the marketplace. This suggestion is clearly inconsistent with our 1984 decision, and seems to be based on an attempt to turn NABOB, AHORA and TRAC's comments against their own interest. Further, despite the recent Capital Formation Notice, I raise the question of "lip service" regarding concerns for small businesses and new entrants, which include minorities, nonminorities and women. See Notice of Proposed Rule Making and Notice of Inquiry in MM Docket No. 92-51, FCC 92-96 (released April 1, 1992) (Capital Formation Notice). It has been one year since the Commission announced its intent to form a Small Business Advisory Committee. To date, while we have formed councils and committees in other areas (e.g., Network Reliability), the Commission has yet to form the Small Business Advisory Committee. Thus, I continue to have serious concerns regarding Commission action in this area. Issues raised in the Capital Formation Notice would be particularly suited for review and discussion by the Small Business Advisory Committee.

Distinctions between AM and FM Service

I remain concerned about the sufficiency of market analysis in the majority's Order. The Notice of Proposed Rulemaking in this docket generally asked whether there was a need to change the ownership rules for AM service. It also asked whether there was a similar need to change ownership rules for FM service. The

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[13] See Appendix 2 (Consumer Assistance Small Business Division List of Distress Sales).

[14] See, Notice of Proposed Rulemaking in G.C. Docket No. 92-52 (adopted March 12, 1992).

focus of the Notice indicated more of a need to assist AM stations. Based on a December 1991 survey from the Mass Media Bureau, it appears that approximately 170 AM stations and 40 FM stations have gone silent for 6 months or more. Thus, based on these figures, it appears that more relief is needed for AM service than for FM service. Yet, no differentiation is made in the national rules. The local rules adopted by the majority attempts to differentiate in markets with 30-39 stations [i.e. 3 AM and 2 FM allowed]. I find these actions do not address the AM problem. I would have considered local rules of 2 AM and 2 FM in most markets with more than 20 voices, and considered additional flexibility for AM ownership on a waiver basis. In markets with less than 20 voices, I would have allowed 2 AM stations to be owned and 1 FM, as long as those did not constitute more than 50% of stations in the local market. I don't believe the Order addresses this issue fairly.

The Order states that most commenters recommend we treat both services the same. It also states that we should rely more on AM improvement actions to address the disparities between AM and FM. However, the majority should be aware that this 30/30 decision will effect the economics and dynamics of the trading market. Other than clear channel AM stations, most AM stations remain technically inferior to most FM stations. Thus, even with AM improvement, as relied upon in the Order,[15] I don't believe that the current rules will give operators more incentives to deal with AM stations.[16] Instead, I believe the majority has revived a great trading market for brokers and large group owners in the hunt for FM stations. I believe AM station health could continue to suffer. I hope this is not true.

Local Rules

When the decision was made on March 12, I wondered where the majority got this complicated labyrinth of market rank and audience share limits. After reviewing the rationale provided in the Order, I now see that the majority did not derive this complex maze from the record of this proceeding. Instead, this

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15 See Order at para. 24.

16 Perhaps, the Commission's cite to the AM expanded band decision portends the answer. Under this determination , AM station licensees are permitted to own one AM expanded band station along with its existing facility without the expanded band station counting towards either the national or local ownership limits. Theoretically, for a period of time, you could have owners controlling almost twice as many AM stations permitted under the new limits. The Order fails to even consider the impact of this expanded band decision on diversity or competition. See Order at para. 57.

is an original extrapolation of how local markets should act according to the FCC. I was amazed by this decision on March 12 and continue to be amazed by it today. The majority of the commenters supported numerical limits and no audience share. A few only recommended market ranking factors. See Appendix 3 attached. Nonetheless, the majority attempts to justify these market rankings [i.e. 40+ stations- 3AM/3FM and 25% audience share limit; 30-39 stations-3AM/2FM and 25% audience share limit; 15-29 stations-2AM/2FM and 25% audience share limit; and less than 15-3 stations/ not more than 50% of stations in the market] based on extrapolations of our one-to-a-market rules.[17] This scheme is curious for several reasons. The market rank and audience share measures go against the recommendations of the majority of commenters with experience in the markets. Second, the Commission contrives these rules because of its own belief on how the markets should behave; not based on real evidence from parties commenting in the record. Third, the main justification used appears to be an analogy with the one-to-a-market rule. Our one-to-a-market rule, however, involves case-by-case waiver approaches, as opposed to the blanket local rule modifications made in this Order. Even the FTC advocates a case-by-case waiver approach in local markets, as opposed to the blanket changes adopted under the new local rules. See Order at para. 38, n. 91. Now, instead of potentially owning up to only 3 stations in a market under the case-by-case, one-to-a-market waiver approach, a single owner can potentially get up to 7 stations [6 radio and 1 TV]. That is over a 100% increase under the one-to-a-market rules.[18] Fourth, the 25% audience share limit does not, as the majority would suggest, prevent combinations of the large stations in larger markets. In a relative sense, there is no real diversity protection; larger stations can combine. The remaining smaller stations can be squeezed out; even before they get a chance to merge. The majority, in Appendix D, goes to great lengths to hide the reality of combinations that could

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[17] See Order at paras. 40-57. No cites to commenter proposals in the record are provided throughout this complicated section of the Order.

[18] This figure does not account for the time brokerage arrangements which will be allowed under the new rules, and probably won't count toward ownership for purposes of the one-to-a-market waivers. Query the extent to which diversity and competition will be impacted by entities combining operations under the new national and local radio ownership rules, one-to-a-market waivers, time brokerage arrangements, and any grandfathering scenarios. Perhaps, at some point, after small players and new entrants are wiped out, the Commission eventually will adopt a regional concentration rule as the result of one of its annual report findings on these situations. Or perhaps it will wait for the Department of Justice to act first.

occur under their new local ownership rules and audience share limits. While all of these statistics appear to be impressive, they hide the real impact of the new rules by taking overview approaches or citing average station statistics. Thus, I attach an appendix to my statement showing possible combinations under these new local rules.[19] Fifth, the 25% audience share data will not account for unrated stations [i.e. stations with audience shares of .5 or less] in designated markets. Thus, I question how such stations will be counted for purposes of multiple ownership? Perhaps the majority hopes that they will disappear without much fanfare under the new rules. Finally, all of the rules on market share applications and market rank are derived by the Commission majority without any industry input. While I have great respect for my colleagues, I am amazed by their attempts to justify this complex labyrinth of local rules without support from the weight of the record. I guess they feel that we at the FCC possess sufficient expertise to devise this complex market ranking/audience share/numerical limit formulation without the need for much record support.

Local rules: 25% Audience Share

The majority provides for a pre-acquisition 25% audience share cap. A local group owner will be permitted to go beyond this 25% audience share cap after acquisition.[20] Such a group of stations also can be transferred as a package. Ultimately, I guess the public must forego the Communications Act public interest standards and rely on antitrust laws. Clearly, diversity will suffer within radio markets as large station groups grow and wipe out smaller players. I am not convinced that the 40% audience trigger identified in footnote 109 of the Order will deter the detrimental impact on smaller radio owners. By the time a group reaches a 40% audience share, what's left for the rest?[21]

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19 For example, according to 1991 Duncan data, under the new rules, in markets with more than 40 station [i.e New York, L.A., and San Francisco], 2 large group owners could own the top 8 stations in each market as part of their 3AM/3FM compliment. What does that leave for the remaining 30+ stations in those markets with smaller audience shares? Even in markets with 30-39 stations, like Chicago, Washington, D.C. and Detroit, 2 groups could still include the top 5-6 stations in their 3AM/2FM compliment. What's left for 20+ stations in the market that fall outside of that grouping? See Appendices 4-6.

20 See Order at para. 56.

21 In addition, I am concerned about the trends that TRAC cites in its record comments when analyzing the majority safeguard language in footnote 109 of the Order. TRAC submits

Herfindahl-Hirschman Index [HHI]

The majority's cite to the Herfindahl-Hirschman Index [HHI] with respect to concentration measurements is also interesting. Despite the majority's argument that radio industry concentration does not approach that of cable or newspapers, FTC comments indicate that certain portions [i.e 39% according to 1987 NAB study] of the radio industry market remain concentrated above 1000 under HHI. The FTC cites 35 out of 259 radio markets as highly concentrated in its 1991 comments in this radio docket.[22] Moreover, even if the overall radio industry is not as concentrated as cable or newspapers, does that mean we blindly deregulate to allow them to match the level of concentration in those industries. As in the cable and newspaper industries, this concentration can benefit only the big players. A recent Broadcasting article indicated that certain large groups, like Cox, Cap Cities, CBS, Infinity and Group W, will most likely be able to pounce on the new rules.

Joint Ventures

I concur with this aspect of the Order on radio rules. As I stated in my March 12 statement, I believe joint venture arrangements allow radio broadcasters to respond to short-term cyclical impacts on their industry. Properly prescribed rules in this area can deter abuses, while giving the radio industry some breathing room. I support joint venture arrangements as long as there is no de facto transfer of control by either station licensee, and as long as there are no antitrust violations. Joint venture arrangements allow stations to pool resources and reduce operating expenses without generally threatening competition or diversity. I particularly supported this aspect of the Order, because I believe these type of contractual arrangements give broadcasters the flexibility to adapt to recessionary periods without changing their ownership structure. Once the market dictates that such arrangements are not

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that every time the Commission relaxes its ownership rules, it points to a "safeguard" which it later abandons. TRAC points to the chain of the national ownership rules, regional concentration rules, the duopoly rules, and the one-to-market rules. Each time one of these rules was relaxed, the Commission pointed to the existence of another as a safeguard. The problem now as TRAC sees it is that all of the rules are essentially gone, and there are no more safeguards. See also, Dissenting Statement of Commissioner Andrew C. Barrett in re: KEZV (FM), Spearfish, South Dakota (One-to-a-market waiver).

22 See FTC Reply Comments at 15. See also, Appendix 7, [NAB 1987 Market Commentation Examination].

beneficial, licensees involved in the venture can terminate the agreement. The Commission can monitor any abuses in this area through the complaint process.

The radio Order also condoned time brokerage arrangements between stations in different markets, since there is less risk of anticompetitive or diversity concerns. These arrangements are similar to network affiliation arrangements in the television world. Again, my concerns with these type of time brokerage arrangements are that there are no antitrust violations, no loss of editorial control and no de facto transfers of control over station programming.

The biggest concern with time brokerage involves those arrangements between broadcast licensees located in the same local market. These situations raise potential competition and diversity implications, transfer of control issues, and antitrust problems. The radio Order approached this subject with caution and placed restrictions on these types of arrangements. As a result, I supported this aspect of the Order as well. I viewed this aspect of the Order as an important way to address the shorter-term economic implications of the recession and corporate restructuring. With flexible time brokerage rules, I advocated a more cautious approach in changing the structural rules.

The rules on local time brokerage attribute ownership of a station to any licensee in that market who brokers more than 15% of a local station's broadcast hours. Also, to avoid total simulcast of another station's programming, licensees are prohibited from duplicating more than 25% of a station's programming under these arrangements. Finally, we require licensees to keep copies of time brokerage agreements in their public inspection files. They also must file within 30 days of execution any agreements that impute ownership of the brokered station [i.e. more than 15% of broadcast hours] with the FCC. Thus, the Commission will be able to monitor the effects of time brokerage arrangements in local markets.

The Order stated that where there is no cognizable ownership interest in any licensee, there is less threat to the integrity of our ownership rules or the diversity and competition principles upon which they are based. Thus, there are no restrictions on these type of arrangements with non-licensees. While I supported the time brokerage aspect of this Order, I did have some concerns about the potential sham or strawman arrangements implicated by an independent program broker [i.e. non-licensee] who acts on behalf of a local station licensee. I will be concerned that the Commission be made aware of any complaints of abuse in this regard that could result in licensees circumventing our time brokerage restrictions.

The Order indicates that due to the substantial ownership changes permitted at the national and local level under the new rules, there is a possibility that time brokerage may decrease as the market realigns itself to the new rules. I did not support the changes in the new ownership rules. I hope that on reconsideration we can adopt more cautious ownership rules, particularly at the local level, that will permit time brokerage arrangements to continue to serve as viable options to address shorter-term market conditions [i.e. recession and corporate restructurings]; without detrimentally impacting radio competition and diversity in the long term.

OTHER CONSIDERATIONS

A. TV/radio cross-ownership [one-to-a-market] implications

Our one-to-a-market rules implicate this subject. Given new radio multiple ownership rules, I am concerned about the implications for further local and regional concentrations. This is an area where I remain deeply concerned. My dissent in Spearfish indicates my belief that the Commission is becoming to lax in this area. It should continue to be handled on strict scrutiny under case-by-case waivers. There are serious diversity and competition implications raised by this subject.

B. TV Multiple Ownership Rule Implications

I hope the Commission does not view this Order as precedent for future actions on the TV national and local multiple ownership limits. TV issues will receive even greater scrutiny from me than this radio ownership docket. I will closely scrutinize both the record and economic data before drawing any conclusions or supporting any options. There are only 1494 TV stations as opposed to 11000 radio stations. I hope the Commission will approach this subject in a sensible, rational and more careful manner.

I also hope that we would resolve any reconsideration petition on our radio rules before moving to the television rules. Any fast action on TV rules will make me suspicious that we are rushing the subject to avoid further scrutiny on these matters.

C. Congressional Appropriations Rider

I believe this decision detrimentally impacts the interests of small players and new entrants, be they male or female, minority or nonminority. I also believe the Congressional appropriations rider on minority ownership policies is implicated by this action. The majority attempt to argue that there is no

nexus between ownership and program diversity.[23] Congress and the Supreme Court have stated otherwise. See note 8, supra.

D. Alternatives On Reconsideration

I am ready to discuss with my colleagues any reasonable, more cautious modifications to these rules that are proposed by commenters on reconsideration. It was my hope that the analysis of this docket would have started in this manner. I believe the national ownership limits should be lowered somewhat, a minority incentive cap should be included, the local rules set at 2/2 with case-by-case waivers to handle additional special circumstances, and audience share and complicated market rank factors eliminated for a more simple approach. Further, I think the Commission should conduct a full study in 4 years to assess the impact of any relaxed rules, and then determine the extent to which further relaxation is warranted. The study also should account for the possible implications of DAB allocations. The annual report requirement adopted by the majority is an extra paperwork that is not likely to result in much tangible action, if any. Before commencing such a review, the Commission needs a starting data base. To my knowledge no such data is currently compiled by the Commission on Minority Ownership, multiple ownership, or local audience share of radio stations. Moreover, in the Order, there are no conditions or factors specified for how the Commission would decide to force divestiture of stations. The footnote in the majority's Order referring to 40% local market share concerns does not give me much comfort; most smaller players are likely to be forced out by that time. It also will be curious to see how OMB reviews all of these annual reporting requirements. A more effective use of Commission resources would be to conduct a major study that analyzed the impact of cautious radio deregulation. Otherwise, how can the FCC determine which trends are due to short-term cyclical factors or long-term competitive changes.

Conclusion

Based on my goals of ensuring fundamental fairness and with consideration of the impact on diversity and competition, I cannot support this Order with respect to the national and local rules. Further, it falls short for the following reasons: 1. The Order does not satisfactorily explain the rationale for adopting complex local ownership rules that are not supported by the weight of the record; 2. The Order obfuscates the potential real-world cumulative concentration effect of its new national rules, local rules and time brokerage rules; 3. The Order ignores the national rule proposals of significant industry players like Cap Cities/ABC, Inc., Group W, Bonneville, the Radio Operators Caucus and others; 4. The Order summarily dismisses the minority

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[23] See Order at paras. 20 and 21.

ownership incentive without sufficient consideration for the state of minority ownership today, Commission minority ownership precedents, and Congressional concerns; 5. The Order conducts an economic analysis based on broad brush overviews of various industries and avoids the intra-industry impacts of prior HHI concentration analysis. Further, the Order summarily avoids detailed analysis of the potential influence of the recession and corporate restructurings on advertising revenues since the late 1980's; 6. The annual reporting requirement places a burden on the Commission staff and the industry. There are no specific criteria established for taking affirmative steps based on regional or local concentrations; and 7. By not taking a more cautious approach to deregulation, the Order pays lip service to the potential impacts of the new ownership and time brokerage rules on small players and new entrants, be they women, non-minorities or minorities. Instead, the Order will line the pockets of a small group of large industry players, radio brokerage firms, and lawyers.

Listing of Appendices

Appendix 1	Listing of Commenters Proposals to Relax the National Ownership Rules
Appendix 2	Minority Ownership Lists, prepared by FCC Consumer Assistance and Small Business Division, Office of Public Affairs)
Appendix 3	Listing of Commenters Suppporting a Relaxation of the local ownership rules
Appendix 4	Ownership Concentration Analysis
Appendix 5	Hypothetical Ownership Concentration Analysis
Appendix 6	Ownership Concentration Analysis
Appendix 7	An Updated Examination of Market Concentration in Radio Markets, prepared by National Association of Broadcasters, June, 1987

APPENDIX 1

INDUSTRY PROPOSALS TO RELAX THE NATIONAL OWNERSHIP RULES

Commenter	Proposed Limit
Bonneville (5 AM, 7 FM)	18 per service, 24 in 3 years
CapCities/ABC (11 Am, 10 FM)	Total of 30
Crawford B'Cast (2 AM, 4 FM)	18 AM, 12 FM
Degree Comm.	20 AM, 20 FM
du Treil, Lundin (Engineering firm)	None for AM, 12 FM
Great American (6 AM, 12 FM)	Moderate expansion
Group W (11 AM, 12 FM)	25 AM, 25 FM
Nationwide Comm. (3 Am, 12 FM)	No less than 20 FM in the top 50 mkts
Sillerman Cos.	25 AM, 25 FM
Radio Operators Caucus, NAB	25 AM, 25 FM
3-D Communications	25% national audience

NOTE: With the exception of 3-D Communications, which prefers a national audience reach limit, the above parties all prefer a numerical limit on ownership. The parties argue that numerical limits are readily identifiable and that audience measurements are too unwieldy and constantly changing. Great American did not express a preferred measuring technique.

APPENDIX 2

MINORITY OWNERSHIP LISTS
(updated March 2, 1992 by FCC Consumer Assistance and Small Business Division, Office of Public Affairs)

STATIONS THAT HAVE ELECTED TO SEEK
DISTRESS SALE RELIEF
DISTRESS SALES APPROVED

TAX CERTIFICATES ISSUED
(Broadcast Stations and Cable
Television Facilities Lists)

TOTAL DISTRESS SALES APPROVED		TOTAL TAX CERTIFICATES ISSUED	
1978:	0	1978:	4
1979:	3	1979:	12
1980:	22	1980:	10
1981:	2	1981:	15
1982:	0	1982:	15
1983:	0	1983:	10
1984:	6	1984:	11
1985:	2	1985:	17
1986:	2	1986:	16
1987:	0	1987:	31
1988:	1	1988:	32
1989:	0	1989:	39
1990:	0	1990:	42
1991: (as of 01/2)	0	1991:	17
1992:	0	1992:	4

APPENDIX 3

Commenters supporting a relaxation of the local ownership:

Blackburn & Co:	Suggests relaxing the rules in all markets with over 20 stations to allow ownership of at least 2 FMs, and 3-4 AMs.
Bonneville:	Suggests flat numerical cap of 2 AM and 2 FM for all markets.
CapCities/ABC:	Suggests a relaxed waiver policy to allow ownership of 2 AMs and 2 FMs in all markets.
CBS:	Suggests flat numerical cap of 2 AM and 2 FM for all markets. Further suggests case-by-case analysis for ownership of third station.
Comm. Corp.	Suggests flat numerical cap of 2 AM and 2 FM for all markets.
Crawford B'Cast:	Suggests allowing ownership of 3 AMs in the top 50 markets.
Degree Comm:	Suggests relaxing the rules to allow AM/FM, FM/AM/AM and FM/FM combinations in markets 20-75.
Demaree Media:	Relax rules for all markets.
du Treil, Lundin:	Relax rules for AM, not FM in all markets.
EBE Communications:	Use an audience share limit in all markets.
Fisher Broadcasting:	Suggests adopting a presumption that a licensee can own 2 AM and 2 FM, but analyze on a case-by-case basis.
Fuller-Jeffrey:	Suggests a flat numerical cap of 2 AM and 2 FM or 10% of the total stations in the SMSA in all markets.
Group W:	Suggests relaxation of the rules to allow ownership of up to 4 stations (2 FM) in top 25 markets.

Holston Valley:	Supports relaxation of the rules to allow for AM/AM combinations, but not FM/FM.
Mid-West Family:	Urges caution due to DAB.
NAB:	Suggests flat numerical cap of 2 AM and 2 FM for all markets.
Salem:	Suggests flat numerical cap of 2 AM and 2 FM for all markets.
Sheboygen Broadcast:	Suggests allowing AM/AM or AM/AM/FM combinations in all markets.
The Woodfin Group:	Suggests flat numerical cap of 2 AM and 2 FM for all markets.

[Source: Comments on file.]

As you can see from the above, most of the commenters suggested a flat numerical cap approach regardless of market size. Only four commenters suggested a market approach. Of these four, only one, Blackburn, suggested an approach similar to that adopted by the R&O. The rest were all market rank approaches.

APPENDIX 4

OWNERSHIP CONCENTRATION ANALYSIS

	Market	Station concentration	Audience share	Other Stations	Audience share
1)	New York	top 5	24.6	#6-10	19.9
2)	Los Angeles	top 5	24.5	#6-10	17.6
3)	Chicago	top 4	24.9	#5	3.9
4)	Philadelphia	top 3	22.0	#4-5	11.3
5)	San Francisco	top 4	23.0	#5	3.9
6)	Boston	top 4	25.8	#5	5.4
7)	Dallas/Ft. Worth	top 3	24.7	#4-5	12.0
8)	Detroit	top 3	20.6	#4-5	10.8
9)	Washington, D.C.	top 4	24.0	#5	4.6
10)	Houston	top 3	23.5	#4-5	10.8
11)	Cleveland	top 3	24.7	#4-5	13.7
12)	Atlanta	top 2	20.7	#3-5	23.0
13)	Minn./St. Paul	top 2	26.0	#3-5	28.3
14)	Tampa/St. Pete	top 2	20.1	#3-5	20.1
15)	Seattle/Tacoma	top 3	22.0	#4-5	10.9
16)	Miami/Ft. Laud	top 4	25.1	#5	4.6
17)	Pittsburgh	top 2	24.4	#3-5	20.4
18)	St. Louis	top 1	18.6	#2-5	26.8
19)	Denver	top 3	25.7	#4-5	12.6
20)	Phoenix	top 3	24.5	#4-5	12.2
21)	Sacramento	top 2	20.3	#3-5	18.5
22)	Baltimore	top 3	25.4	#4-5	13.9
23)	Hartford	top 2	25.0	#3-5	19.0
24)	San Diego	top 3	21.3	#4-5	11.6

25)	Orlando	top 3	25.6	#4-5	13.0
26)	Indianapolis	top 1	14.9	#2-5	42.2
27)	Portland, OR	top 2	19.3	#3-5	24.0
28)	Milwaukee	top 2	21.7	#3-5	21.3
29)	Kansas City	top 2	21.5	#3-5	21.9
30)	Cincinnati	top 2	21.8	#3-5	21.6
31)	Charlotte	top 2	23.9	#3-5	21.8
32)	Nashville	top 2	22.1	#3-5	24.7
33)	Raleigh	top 3	25.4	#4-5	13.9
34)	Columbus, OH	top 2	21.9	#3-5	23.2
35)	Asheville	top 1	20.1	#2-5	43.1
36)	New Orleans	top 2	21.4	#3-5	25.5
37)	Grand Rapids	top 2	18.4	#3-5	22.5
38)	Buffalo/Niagara	top 2	19.8	#3-5	21.6
39)	Memphis	top 2	21.8	#3-5	25.6
40)	Oklahoma City	top 1	18.0	#2-5	33.9
41)	Salt Lake City	top 2	22.7	#3-5	20.7
42)	Norfolk	top 3	23.6	#4-5	13.9
43)	San Antonio	top 2	19.8	#3-5	19.5
44)	Providence	top 3	22.4	#4-5	12.5
45)	Harrisburg	top 2	25.7	#3-5	22.0
46)	Louisville	top 1	19.5	#2-5	37.8
47)	Birmingham	top 1	18.2	#2-5	33.2
48)	Charleston, WV	top 1	26.0	#2-5	41.0
49)	Greensboro, WS	top 2	25.8	#3-5	18.7
50)	West Palm Beach	top 2	24.6	#3-5	20.3

Source: Duncan's American Radio Spring 1991

APPENDIX 5

HYPOTHETICAL OWNERSHIP CONCENTRATION ANALYSIS

Market	Possible Station Combination	Audience Share	Group Ownership Of the Market*
New York (44 stations)	WCBS-FM, WRKS-FM WPAT-AM/FM, WOR WINS	24.1	6 group owners could own all of radio stations
Los Angeles (40 stations)	KOST-FM, KABC KIIS-FM, KLOS-FM, KWKW	23.8	6 group owners could own all of the radio stations
Chicago (35 stations)	WGN, WGCI-FM WBBM-FM, WBBM	24.5	7 group owners could own all of the radio stations
Philadelphia (30 stations)	KYW, WUSL-FM WYSP-FM, WIP	24.0	7 group owners could own all of the radio stations
San Francisco (7 stations)	KGO, KMEL-FM KCBS, KFRC KHQT-FM	24.9	8 group owners could own all of the radio stations
Detroit (34 stations)	WJR, WWWW-FM WWJ, WKQI-FM	24.7	9 group owners could own all of the radio stations
Washington (35 stations)	WPGC-FM, WMAL WMZQ-AM/FM, WTOP WOL	23.9	9 group owners could own all of the radio stations

NOTE: One owner could own all of the groups in column 2 and remain within the proposed 30-30 national limit.

* For purposes of this chart only, the market only includes radio stations with an audience share of 1.0 or more. There are additional stations with an audience share below 1.0, but they are not reported in the Duncan book.

Source: Duncan's American Radio Spring 1991.

APPENDIX 6

OWNERSHIP CONCENTRATION ANALYSIS

Hypothetical Combinations Possible Under New Local Rules

New York- 44 stations
Audience share and rank in ()

Group 1: WCBS-FM (5.2/1), WRKS-FM (5.1/2), WPAT-AM/FM (4.9/3), WOR(AM) (4.6/5), WINS(AM) (4.3/6) Total share: 24.1

Group 2: WLTW-FM (4.8/4), WNSR-FM (4.2/7), WQHT-FM (4.0/8), WCBS(AM) (3.4/11), WFAN(AM) (2.9/15), WABC(AM) (2.7/16) Total share: 22.0

Group 3: WBLS-FM (3.8/9), WHTZ-FM (3.6/10), WXRK-FM (3.3/12), WNEW(AM) (3.1/14), WADO(AM) (1.8/21), WLIB(AM) (1.6/23) Total share: 16.2

The three groups include 17 of the top 26 stations in the market. The remaining FM stations in the market have audience shares of 3.3 or less, and the remaining AM stations have audience shares of 1.3 or less.

Los Angeles (40 stations)
Audience share and rank in ()

Group 1: KOST-FM (6.1/1), KABC(AM) (5.1/2), KIIS-FM (4.7/3), KLOS-FM (4.5/4), KWKW(AM) (3.4/9) Audience share: 23.8

Group 2: KKBT-FM (4.1/5), KBIG-FM (4.1/6), KRTH-FM (3.6/7), KFWB(AM) (3.1/11), KNX(AM) (2.7/16), KTNQ(AM) (2.7/17) Audience share: 20.3

The two groups include 11 of the top 17 radio stations in the market. The remaining FM stations in the market have audience shares of 3.1 or less, and the remaining AM stations have audience reach shares of 2.6 or less.

Chicago (35 stations)
Audience share and rank in ()

Group 1: WGN(AM) (8.2/1), WGCI-FM (6.6/2), WBBM-FM (5.8/3), WBBM(AM) (3.9/5) Audience share: 24.5

Group 2: WVAZ-FM (4.3/4), WLIT-FM (3.9/6), WJJD(AM) (3.6/8), WLUP(AM) (3.1/14), WMAQ(AM) (2.5/18) Audience share: 17.1

The two groups include the top 5 radio stations. The remaining FM stations in the market have audience shares of 3.6 or less. The remaining AM stations have audience shares of 1.8 or less.

Philadelphia (30 stations)
Audience share and rank in ()

Group 1: KYW(AM) (8.7/1), WUSL-FM (7.2/2), WMMR-FM (5.7/4), WIP(AM) (2.0/17) Audience share: 23.6

Group 2: WYSP-FM (6.1/3), WPEN(AM) (5.6/5), WEAZ-FM (5.6/6), WOGL(AM) (1.1/18), WDAS(AM) (0.9/19) Audience share: 19.3

The two groups include the top 6 stations in the market. The remaining FM stations have audience shares of 4.9 or less. The remaining AM stations have audience shares below 1.0.

San Francisco (47 stations)
Audience share and rank in ()

Group 1: KGO(AM) (7.8/1), KMEL-FM (6.1/2), KCBS(AM) (4.8/3), KFRC(AM) (4.3/4), KHQT-FM (1.9/20) Audience share: 24.9

Group 2: KIOI-FM (3.9/5), KNBR(AM) (3.8/6), KOIT-AM/FM (3.7/7), KDFC-AM/FM (2.7/10), KSFO(AM) (2.1/18) Audience share: 16.2

The two groups include the top 8 stations in the market. The remaining FM stations have audience shares of 3.0 or less. The remaining AM stations have audience shares of 1.2 or less.

Detroit (34 stations)
Audience share and rank in ()

Group 1: WJR(AM) (8.0/1), WWWW-FM (6.3/2), WWJ(AM) (5.7/4), WKQI-FM (4.7/6) Audience share: 24.7

Group 2: WJLB-FM (6.3/3), WJOI-FM (5.1/5), WXYT(AM) (3.7/11), CKLW(AM) (2.7/17), WCXI(AM) (1.4/20) Audience share: 19.2

The two groups include the top 6 stations in the market. The remaining FM stations have audience shares of 4.5 or less. The remaining AM stations have audience shares of 1.1 or less.

Washington (35 stations)
Audience share and rank in ()

Group 1: WPGC-FM (7.6/1), WMAL(AM) (4.5/6),
WMZQ-AM/FM (5.9/2), WTOP(AM) (3.3/13)
Audience share: 21.3

Group 2: WGAY-FM (5.6/3), WKYS-FM (4.9/4),
WOL(AM) (2.6/17), WWRC(AM) (2.5/19)
Audience share: 15.6

The two groups include 5 of the top 6 six stations in the market. The remaining FM stations have audience shares of 4.6 or less. The remaining AM stations have audience shares below 1.0.

Source: Duncan's American Radio Spring 1991

Comments:

One group owner could own one group from each of the seven cities listed above and still remain within the proposed 30-30 limit.

Under the proposed local ownership rules, one owner can enter the Detroit radio market, which has between 15 and 29 radio stations, and purchase four of the top five radio stations (WJR, WWWW-FM, WWJ and WJOI-FM) and still remain within the audience reach level of 25%. Included in these stations is the top-billing station WJR, billing $19,000,000 in 1990. Alternatively, one owner can purchase any combination of 2 AM and 2 FM stations ranked less than 5th in the market without reaching the 25% audience reach limit.

APPENDIX E

AN UPDATED EXAMINATION OF MARKET CONCENTRATION IN RADIO MARKETS

June 1987

Prepared By:
National Association of Broadcasters

AN UPDATED EXAMINATION OF MARKET CONCENTRATION IN RADIO MARKETS

MARK R. FRATRIK

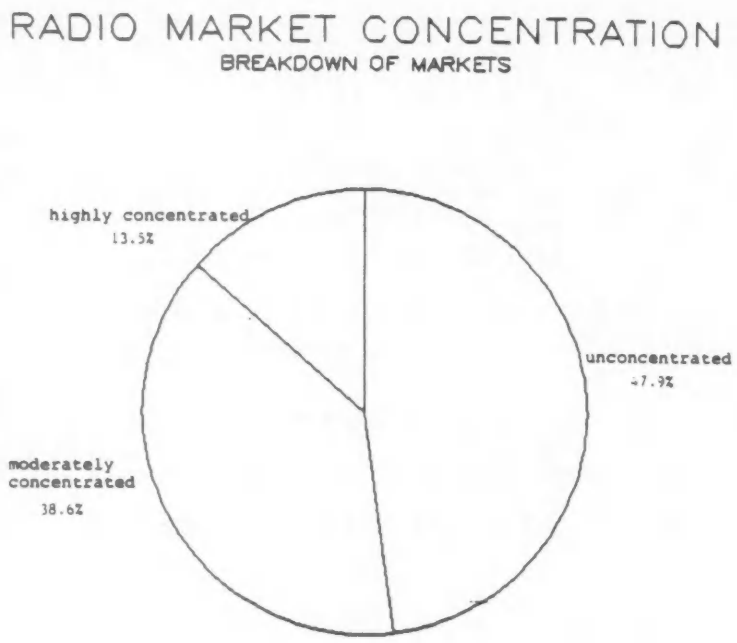
Director of Financial and Economic Research

National Association of Broadcasters

June 10, 1987

Results

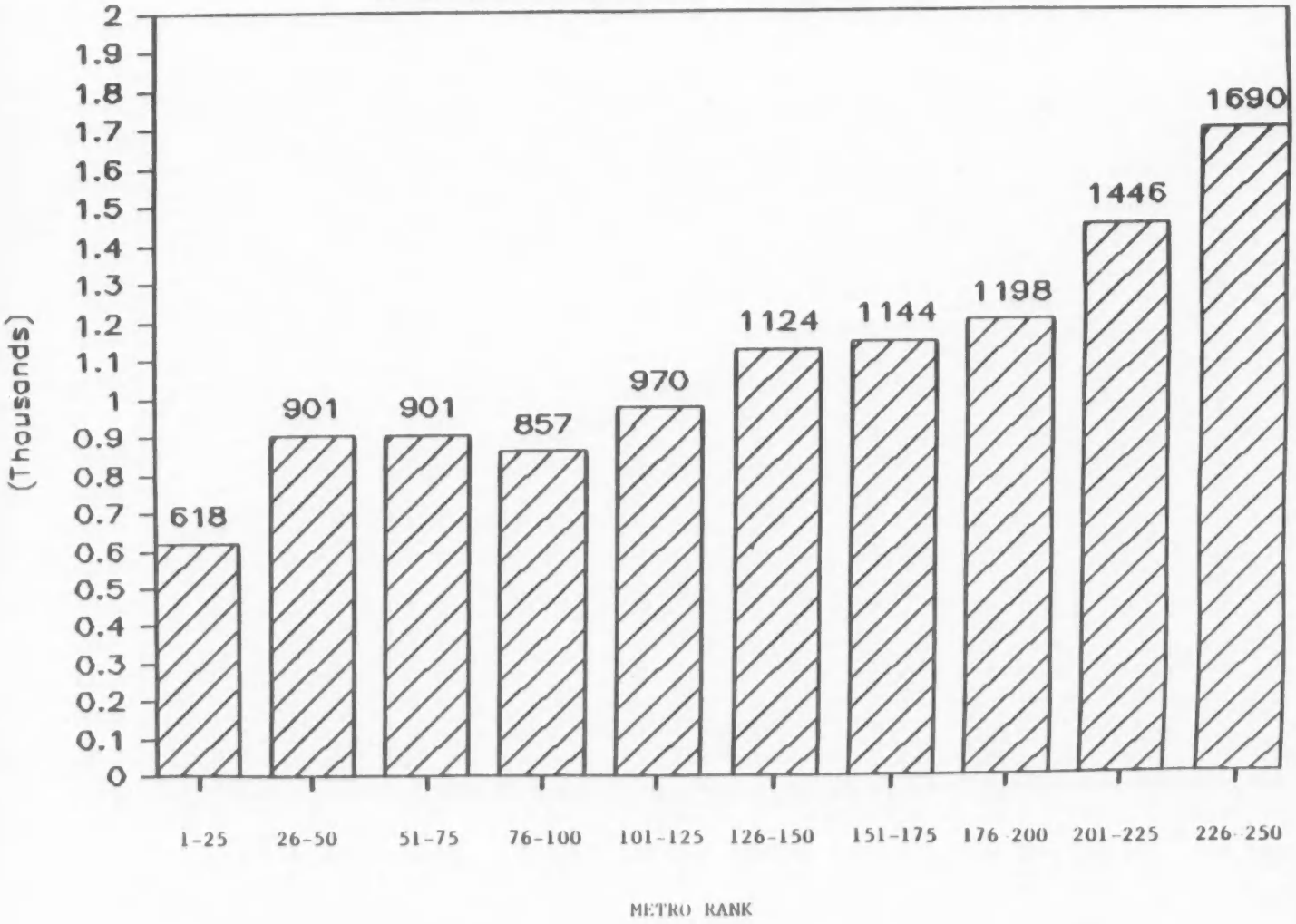
Of the 259 markets examined, 47.9% are "unconcentrated," 38.6% are "moderately concentrated," and 13.5% are "highly concentrated".



The following chart describes the relationship between market size and concentration. It reports the average HHI for market groupings. As can be seen from that chart, the larger markets with a greater number of stations generally have low HHIs, reflecting their low levels of concentration. For those unconcentrated markets with low HHIs, some relaxation of the duopoly rule would not greatly change the competitive nature of these markets.

RADIO MARKET CONCENTRATION

AVERAGE HERFINDAHL – HIRSCHMAN INDEX



March 12, 1992

STATEMENT OF
COMMISSIONER ERVIN S. DUGGAN

In Re Revision of Radio Rules and Policies (MM Docket No. 91-140)

This Commission has a mandate from Congress to regulate broadcasting in the public interest. Perhaps no mass media service under our jurisdiction has been as historically, fundamentally close to that interest--- to the communities and towns of this country--- as radio. Yet, over the course of this proceeding, it has become abundantly clear to me that the face of the radio industry is changing dramatically and permanently--- and that the ability of radio to continue to serve the public interest is suffering as a consequence. The actions we take today are a moderate attempt to deal with these sea changes and, ultimately, to help a stable and profitable radio industry continue to provide the programming, news and community service that we have long expected from it.

In recent weeks, nearly 80 sets of comments have arrived in my office supporting changes in the Commission's radio ownership rules: comments from such places as North Beverly, Massachusetts, East Lansing, Michigan, Lufkin, Texas and Sacramento, California. The great majority were not the impeccably written, extensively footnoted, word-processed products of large law firms. Often, they were often simple two- and three-page letters. Were they part of an organized campaign? Perhaps many were. But they were not the standard canned argument.

These comments, rather--- all of which were added to the record in this docket--- were often poignant and persuasive pleas for regulatory change from stations that are struggling to serve their audiences in an increasingly beleaguered radio marketplace.

One such plea came from the Chairman of station WNUS in Belpre, Ohio, whose letterhead read, with a note of pride, "Radio Gets Results!. . .Serving the Parkersburg, WV/Marietta-Belpre, Ohio Market." "I have been in the business of owning and operating Radio Stations for the past thirty years," the letter read. "In all of that time, I have never experienced the dilemma that each and every broadcaster is experiencing today.

"All markets, large and small," it continued, "face the very same problem of too many facilities. The smaller markets are suffering a disproportionate hardship because of the lack of advertising dollars... too many stations... not enough advertising dollars to go around. What has been a fairly stable

industry in the past has turned into a day-to-day survival game... [T]he station that goes into Chapter 11 last is the winner."

The consequences? "The base premise of 'community service,'" the writer said, "becomes increasingly difficult to perform without the assistance of talented people to execute these programs on a daily basis. Talent costs money."

A group owner in Indiana wrote: "The loser in this [crisis] is obviously the public. . . . Stations can't afford a local news staff. Stations can barely pay the minimum number of people to keep the station on the air, let alone a local news staff. . . . What a shame to harm the public in this manner," he said.

"Those in our government who would scoff at such examples and scoff at the utter seriousness of this situation are shortsighted, indeed. The crisis is real and it is now."

I cite these letters not simply because they are so clearly genuine or so compelling, although certainly they are both. I do so because they accurately represent the gravamen of the comments received in this docket supporting meaningful changes in the Commission's radio ownership rules as a means of addressing these severe challenges. The comments cut across groups, individual stations, small markets, large markets, trade associations, brokers, banks and former broadcasters. In the aggregate, they tell the story of an American audience that is increasingly ill served when much of the radio industry that serves the public must struggle just to survive.

Unfortunately, these listeners do not have a powerful lobbying group keeping them informed of these problems and pressing their interests at the FCC. But I strongly believe that if they fully understood the depth and permanency of the structural erosion of the industry, they, too, would have flooded us with calls for action. It is their long-term interests that I have foremost in mind in moderating some of the FCC's structural rules affecting ownership in the radio industry.

The statistics that piled up during this proceeding dramatically underscore the anecdotal evidence. The FCC's Mass Media Bureau found that half or more of the nation's 10,000 commercial radio stations lost money in 1990. Average AM profits dropped by half; average FM profits dropped by fully a third. One half of one percent of all stations accounted for 50 percent of the industry's profits in 1990.

These numbers are alarming. They are not merely an artifact of the current recession. On the contrary, we found

that they arise from a trend that began in the mid-1980s and has not abated. The industry's financial base is rapidly eroding, spurred both by the glut of stations and aggressive new competitors, including cable. Cable advertising sales reached $3 billion in 1991, an 18 percent increase from the previous year. Most broadcasters now view their local cable systems--- which are undeniably a fixture of the mass media landscape--- as their primary competitor for local advertising dollars. These competitive forces are here to stay.

So there we have it: The numbers and the comments in the record support the conclusion that stations across the nation cannot continue to serve their communities under current conditions. This fundamental truth provides the foundation for our actions today.

I must say, however, that the solutions advocated by many struck me as extreme. Some recommended abolishing the national ownership limits. Some called for radical reform of the local ownership rules, including a no-holds-barred approach to the ownership of as many AM and FM stations in a single market as any owner could achieve.

The guiding principle for me throughout this proceeding, however, has been to find a solution that would bring significant progress without endangering the Commission's traditional goals of localism and diversity: an incremental approach, not radical and dangerous surgery. I believe incremental change in the ownership rules is important for two reasons. First, as the foregoing comments illustrated, we can now see some decidedly unwelcome results of radical actions in the past. Perhaps the best example is Docket 80-90, which added nearly 700 new FM stations across the country. We have seen that 80-90, however well-intentioned, was an economic disaster for the industry. While the FCC, perhaps, could not have completely foreseen the consequences, the result convinces me that precipitous regulatory change, even when undertaken in the name of competition and economic growth, is much more complicated than we can fully anticipate. Better, then, to go carefully.

A second point is that we cannot yet predict the impact of oncoming new technologies like DAB and multichannel cable radio. These forces are likely to have an even more profound effect on the equilibrium of the radio industry and on the important public interest goal of localism. Thus--- although a significant part of the record argued for it, and our own Mass Media Bureau appeared to endorse it--- I never believed that decimating the ownership rules would be wise.

At the other extreme, some favored clinging to the status quo. They urged us to freeze the existing rules, or to make

changes so small as to be largely symbolic. Neither of these options, in my view, would allow the industry to rejuvenate itself in a way that would lift every boat.

Fortunately, the Commission in its action today has steered a course between radical change and regulatory paralysis. The new rules we adopt today hew closely to a structure that I favored from the outset of the Commission's discussions of these issues. They reflect an extended, serious dialogue among the Commissioners--- one that Chairman Sikes actively promoted in a process of consensus-building. His role in crafting these rules was crucial, and he is to be commended for the leadership he demonstrated throughout the process.

The Report and Order represents a genuine victory for the public interest. It is the essence of measured change: a reasonable relaxation of the rules, not a destructive explosion of them. Today the Commission acts in a way that is true to the record and true to the principle of incrementalism. Our actions do not gut either the national ownership caps or the duopoly limits, which are particularly vital, in my judgment, to maintaining diversity, local community service and healthy competition. Our actions also feature significant new standards for time brokerage or "local market" agreements, which I feared were out of control and threatened a mockery of our ownership policies. I believe that our new rules clearly signal that the FCC strongly prefers to encourage ownership over LMAs, and that licensees who enter into such arrangements must, as trustees of the public interest, retain full editorial, financial and managerial control of their stations.

Our rules must operate in the real world. As part of our actions today, we make a definitive commitment to undertake an annual real-world review of the results of our rule changes. We direct the Mass Media Bureau to prepare and present to the full Commission a yearly study of the impact of the rules on competition, diversity and minority ownership. As part of that process, we will carefully monitor market shares of both national and local radio combinations, and the Bureau will recommend any Commission response that may be appropriate. I strongly supported including such a provision. I view it as crucial. I believe that the FCC is under a heavy burden to prove itself faithful to its own goals of competition, local service and diversity in the radio industry, and the review will help us to remain so.

In particular, I will treat the annual report as a recurring summons to promote minority participation in broadcasting. If our actions today should prove to have any negative effect on minority ownership, I will insist that we take swift and effective remedial action. Our rule changes must

encourage opportunities for expanding minority broadcast interests, and we must be vigilant to ensure that those opportunities are realized.

Finally, I would note that only two-thirds of the "12-12-12" rule is revised today. While the Commission's current Inquiry into the state of the video marketplace raises the possibility that we might reexamine the last "12," I would simply underscore that the nation's radio and television marketplaces are different in many fundamental ways. Entirely distinct concerns would drive any proceeding dealing with television ownership rules. Thus, while I support the reforms we adopt in this Report and Order, no one should draw the automatic conclusion that our actions here implicate in any way the issues raised in the video Inquiry.

In this action--- so feared by many, so urgently desired by others--- we navigate prudently between the Scylla of deregulatory excess and the Charybdis of inaction. What we do--- both process and result--- will be scrutinized, as it should be. I believe that it will withstand that scrutiny as an example of significant, but prudent, change undertaken for the benefit of the American public.

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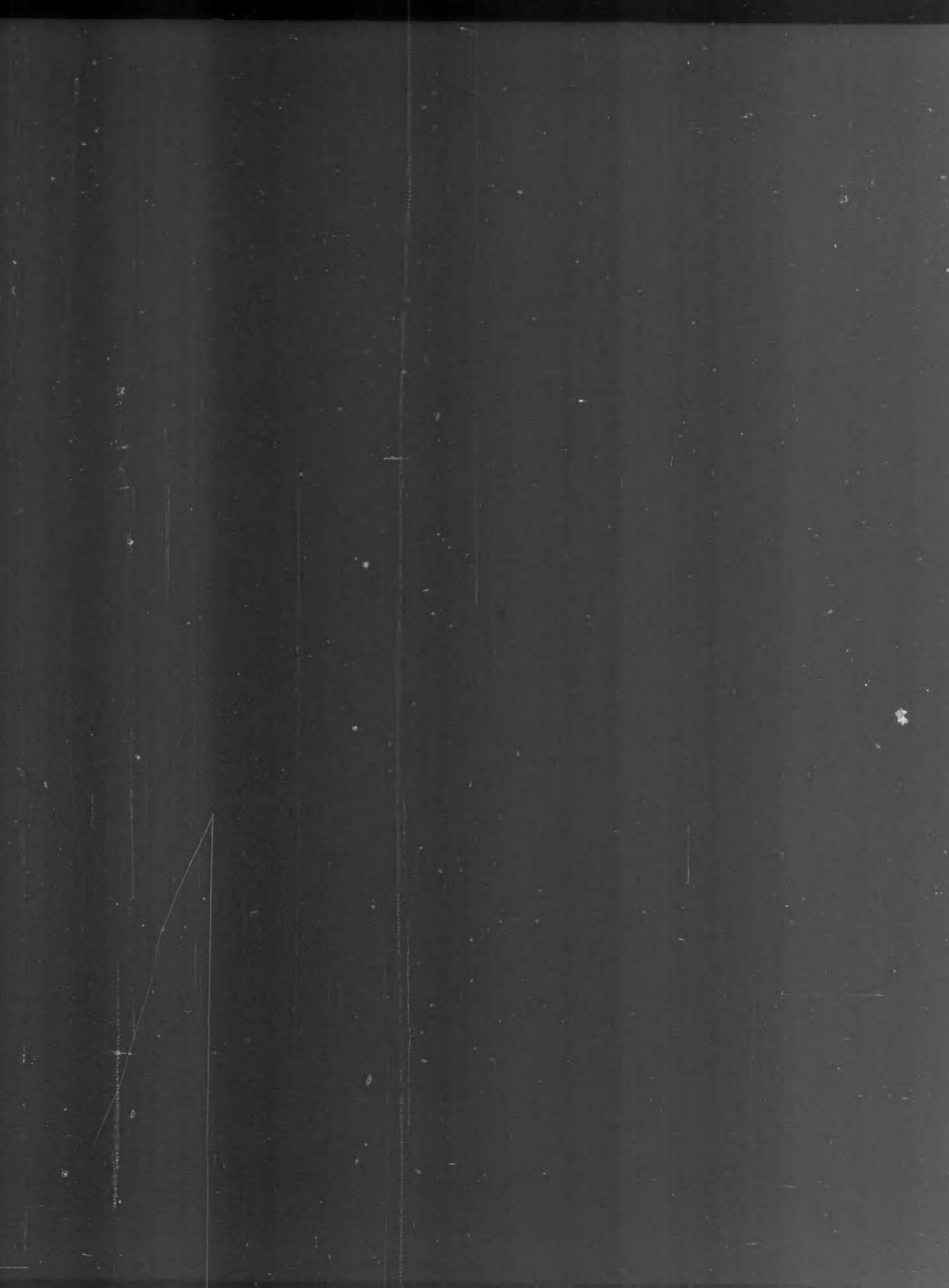
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